THOMAS S. BIGGS INNS OF COURT
EVIDENCE SMARTS![1]
TEAM 6
FEBRUARY 17, 2015

"tis known that I am a pretty piece of flesh."
-- Romeo and Juliet, 1:1

FACTS OF THE CASE:

At the parking lot of the Spice Rack neighborhood adult superstore, in Naples, FL, a 400-pound pedestrian collides with a lawyer in a Smart car on his way to a party. The lawyer sues the pedestrian for his injuries, since he claims he was the guest passenger in the Smart car, which was driven by his companion, dressed as a Mermaid, who miraculously escaped injury.

All these facts are known, but how do the marginally competent trial attorneys get them and other key information into evidence?

TEAM AND CAST OF CHARACTERS

1. Plaintiff Rodney Rude: Javier A. Pacheco, Porter Wright Morris & Arthur LLP.

2. Plaintiff's counsel Mr. Abbott: Michael T. Traficante, Grant Fridkin Pearson, PA.

3. Plaintiff's witness Mona Milanovich: Hon. Maria I. Dente, General Magistrate, Twentieth Judicial Circuit.

4. Defendant Francis Hummingbird: Cary Goggin, Goede, Adamczyk & DeBoest, PLLC.

5. Defendant's counsel Mr. Costello: Richard Montecalvo, Office of State Attorney - 20th Judicial Circuit.

6. Defense witness Karlotta "Ariel" Kinsey: Hilda Cenecharles, Cenecharles Law Offices.

7. Judge Hopkins: James W. Chandler, The Law Office of James W. Chandler, P.A.

8. Moderator Panel

- Sara Hall, Office of State Attorney - 20th Judicial Circuit.
- Alex Peterson, Peterson Family Law.
- Corey Huffman, Legal Aid Service of Collier County.
- Hon. Robert L. Crown, Collier County Court Judge.

[1] **Script based on script prepared by Fritz Ziegler (fritz@zlex.com), submitted on December 29, 2011, 22nd Judicial District American Inn of Court, St. Tammany Parish, Louisiana.**

1 Fla. Prac., Evidence § 404.6 (2014 ed.)

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Evidence
Database updated June 2014

Charles W. Ehrhardt [a0]

Chapter 4. Relevancy
90.404. Character Evidence; When Admissible

§ 404.6 Character of the victim

Generally, evidence of the victim's character is inadmissible. [1] If a defendant alleges a defense that rests upon the conduct of the victim, the defendant may offer evidence of the victim's character as circumstantial evidence to prove that conduct. Under section 90.404(1)(b), evidence of a pertinent character trait of the victim is admissible when it is offered by the accused to prove that the victim acted in conformity with his or her character. [2] If the defendant offers evidence of the victim's character, the prosecution may offer evidence to rebut the defense evidence of the victim's character. [3] The evidence is not admissible unless it is for rebuttal. Only if the defense raises the issue by its cross-examination of the victim or by offering relevant evidence attacking the victim's character may the prosecution respond with evidence of the victim's good character. [4] An attack on the victim's character during the opening statements does not constitute an attack on character for the purpose of permitting the state to bolster character pursuant to section 90.404(1)(b). [5]

Character evidence is admissible under section 90.404(1)(b) to prove the conduct of the victim when the conduct is a material issue. The conduct of the victim is material under the substantive criminal law only in a few situations. [6] The most common situation is when the defense asserts that the accused acted in self-defense. [7] When a criminal defendant alleges self-defense, evidence of the victim's character trait of violence may be admissible for two purposes. [8] First, the evidence may be offered on the issue of who was the aggressor. Since the conduct of the victim is relevant or pertinent, section 90.404(1)(b) permits evidence of a pertinent character trait of the victim to be admitted as evidence of the victim's conduct. Evidence relating to the victim's violent character is admissible under section 90.404(1)(b) when offered by the defendant to prove that the victim was in fact the aggressor. It is offered to prove that, at the time of the alleged crime, the victim acted in conformity with a pre-existing character trait. [9] When character evidence is admissible to proved that the victim was the aggressor, section 90.405(1) provides that the pertinent character trait may be proven by witnesses who are aware of the victim's reputation for that trait.

Section 90.404(1) does not mention whether any independent corroboration of the aggression is required as a foundation for this character evidence. However, Florida cases require that there be evidence of an overt act on the part of the victim at or about the time of the incident which reasonably indicates a need for the accused to act in self-defense. [10] Because the evidence is offered to show conduct of the victim rather than the state of mind of the defendant, whether the defendant has prior knowledge of the victim's violence is not relevant. [11] Once this character evidence is offered by the defendant, it may be rebutted by the prosecution. [12]

The type of character evidence admissible to prove that the victim was the aggressor is limited to the testimony witnesses who are aware of the victim's reputation for the pertinent character trait. [13] See section 405.1 of the Text. Evidence of a prior specific act of the victim, e.g., a fight the previous week, is not admissible to prove that the victim was the aggressor since the victim's character is not an essential element of self-defense. [14] See section 405.3 of the Text.

The second purpose for which evidence of the victim's violent or aggressive character is admissible when an accused claims self-defense is to prove that the accused was reasonably apprehensive of the victim and that the defensive measures of the accused were reasonable. [15] In this situation, the evidence is being offered to prove the defendant's state of mind, that is,

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the reasonableness of the defendant's belief concerning imminent danger, rather than the conduct of the victim.[16] As a foundation for the admission of evidence for this purpose, there must be some evidence of an overt act by the victim about the time of the event which reasonably indicated a need for the defendant to act in self defense,[17] and there must be evidence that the accused knew of the victim's acts of violence or aggression.[18] The admissibility of this evidence to establish the accused's apprehension does not violate the policy of section 90.404 which excludes character evidence when it is offered to prove conduct. In this situation, the evidence is offered to prove the reasonable apprehension or state of mind of the accused rather than to prove that the victim actually was the first aggressor.

The defendant in a homicide case may allege as a defense and offer evidence that the victim was the aggressor and the actions of the defendant were in defense against that aggression. When such a defense is presented, the prosecution, under section 90.404(1)(b) 2, may offer reputation evidence of the character trait of the victim's peacefulness to rebut allegations that the victim was the aggressor regardless of whether the accused has offered character evidence relating to the victim's violence. The evidence of the defendant that the victim of the homicide was the aggressor, opens the door to evidence of the victim's peacefulness offered by the prosecution.[19] For this provision to apply, it is not necessary that character witnesses have been called; any testimony that the homicide victim was the aggressor permits the prosecution to introduce the reputation testimony.[20] It is the only time that the prosecution may use character evidence under section 90.404(1)(b), regardless of whether the defendant introduces evidence of the victim's character, other than his own testimony.

In a sexual battery prosecution, evidence of the victim's character is generally inadmissible to prove that the victim consented to the sexual activity.[21] See section 404.7 of the Text.

Most criminal cases do not involve the victim's conduct being an element of the claim or defense. In those cases, evidence of the victim's character is inadmissible pursuant to section 90.404(1).

Federal Rule of Evidence 404 is similar to section 90.404(1)(b). However, Federal Rule of Evidence 404(a) was amended effective December 1, 2000, to provide that when an accused decides to attack the victim's alleged character, the prosecution may introduce evidence of the same character trait of the accused.

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Footnotes

a0 Mason Ladd Professor of Evidence, Florida State University College of Law

1 See Espinosa v. State, 589 So. 2d 887, 892 (Fla. 1991), judgment rev'd on other grounds, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) (Evidence that the victim "had a history of violent behavior when he lived in Nicaragua" was inadmissible under section 90.404(1) to show that the victim "had a generally violent character ... ."); Hayes v. State, 581 So. 2d 121, 126 (Fla. 1991) (No error to restrict defendant's evidence of the "victim's recent consumption of marijuana and cocaine."); Love v. State, 971 So. 2d 280, 285#86 (Fla. 4th DCA 2008) (No error to exclude evidence of officer-victim's character and reputation where self-defense is not alleged.); Pintado v. State, 970 So. 2d 857, 860 (Fla. 3d DCA 2007) (No error to exclude defense evidence that victim had previously hit defendant and the victim's reputation for violence when the defendant did not allege that he acted in self-defense but asserted that he did not stab the victim.); Ruland v. State, 614 So. 2d 537 (Fla. 3d DCA 1993) (In an aggravated battery prosecution no error to exclude evidence that the victim was a drug dealer or user because it was an "impermissible attack on the character of the victim." Citing Text.).

2 Munoz v. State, 45 So. 3d 954, 956 (Fla. 3d DCA 2010) ("Generally, evidence regarding a victim's character is inadmissible. The exceptions to this rule are where the victim's character is an essential element in the case, or where, as here, the defendant asserts that he acted in self-defense. A defendant who asserts that he acted in self-defense must, however, lay a proper foundation before he may present evidence of the victim's character, and that evidence must be relevant to resolve an issue as to either the victim's conduct or as to the reasonableness of the defendant's fear at the time of the incident. As part of that foundation, the defendant must establish that the victim committed some overt act at or about the time of the incident that reasonably indicated a need for action by the defendant in self-defense.

Once the proper foundation is laid, the defendant may introduce evidence of the victim's reputation or of specific instances of the victim's conduct. There are, however, important distinctions and evidentiary requirements between reputation evidence and evidence of specific acts admitted under section 90.404(1)(b). The purpose of introducing the reputation evidence in a self-defense case is to show that the victim was the initial aggressor. Reputation evidence is offered to show that the victim acted in conformity with

a known character trait. Because reputation evidence relates to the conduct of the victim, the defendant is not required to have had prior knowledge of the victim's reputation in the community.

Conversely, the purpose of specific acts evidence in a self-defense case is to demonstrate the reasonableness of the defendant's fear at the time of the incident. Because the defendant's state of mind is at issue, before the defendant may introduce specific acts allegedly committed by the victim, he must show that he had prior knowledge of these acts.").

3 Section 90.404(1)(b) 1 ("or by the prosecution to rebut the trait."). The testimony of the victim may also open the door to cross-examination concerning his prior character. See Luck v. State, 531 So. 2d 1377, 1382 (Fla. 2d DCA 1988) (When victim testified during trial of defendant charged with aggravated battery that he (the victim) "was basically a nonviolent person," error to prohibit the defendant from cross-examining victim regarding prior assaults and beatings victim had committed as well as excluding defense offer of extrinsic evidence of victim's abuse.).

4 Jacob v. State, 546 So. 2d 112, 115 (Fla. 3d DCA 1989) (During prosecution for aggravated battery on a law enforcement officer, it was error to permit the prosecution to ask the guard whether there had ever been any disciplinary actions against him for violence on inmates.). See Whitted v. State, 362 So. 2d 668, 673 (Fla. 1978).

5 Burns v. State, 609 So. 2d 600, 605 (Fla. 1992) ("Comments made by defense counsel during opening statement do not 'open the door' for rebuttal testimony by state witnesses on matters that have not been placed in issue by the evidence.").

6 Dugree v. State, 615 So. 2d 713, 721 (Fla. 1st DCA 1993) (Evidence of the character of the victim is admissible under section 90.404(1)(b) only when a claim of self-defense is made: "We agree that the trial court properly excluded the proffered character evidence, because the defendant did not show how the victim's character was pertinent, that is, he did not rely on the defense of self-defense or raise an issue concerning who was the first aggressor.").

Occasionally, a decision misinterprets section 90.404(1)(b) and applies it when the victim's conduct is not a material issue. See Wade v. State, 610 So. 2d 664, 666 (Fla. 1st DCA 1992) (In prosecution for attempted murder with a firearm, error to exclude testimony that defendant was aware of victim's reputation as a person "who likes to rob people." Under the facts of the case, "the pertinent character trait is a propensity for violent behavior. Therefore, this issue may be restated as whether a reputation for being a robber is evidence of a propensity for violence .... [R]obbery by its nature involves the threat of violence.").

7 Arias v. State, 20 So. 3d 980 (Fla. 3d DCA 2009) (Quoting Text with Approval).

8 Munoz v. State, 45 So. 3d 954, 956 (Fla. 3d DCA 2010) ("Generally, evidence regarding a victim's character is inadmissible. The exceptions to this rule are where the victim's character is an essential element in the case, or where, as here, the defendant asserts that he acted in self-defense. A defendant who asserts that he acted in self-defense must, however, lay a proper foundation before he may present evidence of the victim's character, and that evidence must be relevant to resolve an issue as to either the victim's conduct or as to the reasonableness of the defendant's fear at the time of the incident. As part of that foundation, the defendant must establish that the victim committed some overt act at or about the time of the incident that reasonably indicated a need for action by the defendant in self-defense.

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Conversely, the purpose of specific acts evidence in a self-defense case is to demonstrate the reasonableness of the defendant's fear at the time of the incident. Because the defendant's state of mind is at issue, before the defendant may introduce specific acts allegedly committed by the victim, he must show that he had prior knowledge of these acts."); Pino v. Koelber, 389 So. 2d 1191, 1194 (Fla. 2d DCA 1980).

9 Love v. State, 971 So. 2d 280, 287#88 (Fla. 4th DCA 2008) (No error to exclude evidence of officer-victim's character and reputation as a police officer. Defendant's "question did not call for a 'pertinent trait of character' under section 90.404(1) (b) 1; a reputation as a 'police officer' is not a character trait like peacefulness or honesty. Even where character evidence is proper, admissible evidence is 'limited to the testimony witnesses who are aware of the victim's reputation for the pertinent character trait.' [Quoting Text]. A litigant may not prove a character trait by offering evidence about instances of conduct that demonstrate the trait.").

10 Berrios v. State, 781 So. 2d 455, 458 (Fla. 4th DCA 2001) (No error in prohibiting defendant from introducing evidence of the victim's character on issue of self-defense when defendant failed to demonstrate "some overt act by the victim at or about the time of the incident which reasonably indicated to the defendant a need for action in self-defense."); Sanford v. State, 795 So. 2d 654, 655 (Fla. 3d DCA 2001) (same).

11 Melvin v. State, 592 So. 2d 356, 357 (Fla. 4th DCA 1992) (When defendant had asserted self-defense during a murder prosecution, trial court committed reversible error by excluding police officer's testimony that victim had "a reputation as a bully" even though

there was no showing that defendant had knowledge of the reputation.); Dwyer v. State, 743 So. 2d 46, 48 (Fla. 5th DCA 1999) ("[A] defendant who alleges self-defense can show, through the testimony of another witness, that the alleged victim had a propensity for violence, thereby inferring that the alleged victim was the aggressor. A defendant's prior knowledge of the victim's reputation for violence is irrelevant because the evidence is offered to show the conduct of the victim, rather than the defendant's state of mind.") (Citing Text.); Marcum v. State, 341 So. 2d 815, 817 (Fla. 2d DCA 1977) ("In a case involving the issue of who was the aggressor, the court held that it was irrelevant that the defendant was not aware of his adversary's reputation.").

12 See McCormick on Evidence § 193.

13 Hoffman v. State, 705 So. 2d 962, 966 (Fla. 5th DCA 1998) (In prosecution for second degree murder, trial court properly denied defendant's requested instruction relating to the victim's reputation and self defense: "To prove reputation under section 90.405 ... it is necessary to lay the foundation that the witness is aware of the person's reputation in the community. Evidence of the victim's reputation in the community was never offered. There was evidence of prior violent acts committed by the victim but specific prior acts are not reputation evidence. Since no evidence was offered as to the victim's reputation in the community, the trial court properly denied that portion of the instruction.").

14 Singh v. State, 36 So. 3d 848 (Fla. 4th DCA 2010) (Testimony by defendant's father and uncle concerning their prior confrontations with victim was inadmissible to support defendant's theory of self-defense at his trial on charge of second-degree murder, when there was no evidence that defendant was aware of the confrontations.).

15 State v. Smith, 573 So. 2d 306 (Fla. 1990) ("A defendant's testimony that he or she knew about specific acts of violence committed by the victim is relevant to show ... the reasonableness of the defendant's apprehension to support a self-defense claim .... Testimony that other people knew of specific acts of violence committed by the victim is not relevant because it sheds no light on the defendant's state of mind; it shows only that the victim had a propensity for violence .... Although reputation evidence may be valid for that purpose, 'specific act' evidence is not ....

"However, 'specific act' testimony of third parties may be admissible as corroborative evidence if it is first shown that the defendant knew about the very same acts of violence. Such corroborative evidence should be admitted cautiously in light of the need to limit evidence of specific acts because, inter alia, a jury may tend to give the evidence too much weight, or it may sidetrack the jury's focus."); Savage v. State, 99 So. 3d 1001, 1002-03 (Fla. 1st DCA 2012) (Evidence of prior acts of violence that defendant had suffered at the hands of the victim was admissible to show defendant was reasonably apprehensive of the victim.); Britton v. State, 928 So. 2d 386, 388 (Fla. 5th DCA 2006) (In prosecution for manslaughter as a result of a stabbing, no abuse of discretion to refuse to admit testimony that three years before the incident the victim threatened two persons, other than the defendant, by saying "Don't be laughing at me. I'll blow your head off." The defendant testified that she did not think about defendant's past acts of violence before stabbing him. The threat "does not seem to have had any relevance to Britton's state of mind on the morning of the stabbing" and was inadmissible under section 90.402.); Mezqueda v. State, 541 So. 2d 777 (Fla. 3d DCA 1989) (Trial judge properly limited evidence in support of defendant's self-defense claim to the victim's reputation for violence and "particular acts of violence which were known to the defendant."); E.B. v. State, 531 So. 2d 1053 (Fla. 3d DCA 1988) (Error to sustain objection to juvenile's testimony that "he was aware that Randall had a reputation as a good fighter and that on a previous occasion Randall had threatened to beat" him. Contains an excellent discussion of cases.); Campos v. State, 366 So. 2d 782, 784 (Fla. 3d DCA 1978) ("The law is well settled that when the appropriate predicate is met, by the showing of an overt act by the deceased at or about the time of the slaying which reasonably indicates a need for action by the defendant in self-defense, evidence of the specific violent acts of the deceased is admissible, when offered in support of a defense of self-defense, for the limited purpose of illustrating the defendant's state of mind at the time of the incident. *Sub judice*, the defense had showed overt acts on the part of the deceased at or near the time of the slaying, i.e. chasing appellant by car, threatening appellant's life, allegedly reaching for a weapon, and therefore, the Morales testimony should have been permitted as an indication of appellant's state of mind and it was error to exclude same."); Williams v. State, 252 So. 2d 243, 247 (Fla. 4th DCA 1971) ("[W]e conclude that where a proper predicate is laid by the showing of some overt act by the deceased at or about the time of the slaying that reasonably indicated a need for action by the defendant in self-defense, evidence of prior specific acts of violence by the deceased known to the defendant at the time of the slaying may be admitted for the limited purpose of proving the reasonableness of the defendant's apprehension at the time of the slaying. In the case at bar when the defendant sought to testify as to three specific incidents related to the violent character of the deceased, evidence had theretofore been presented which tended to show that on the day of the slaying and within a reasonably short time prior thereto the deceased had announced an intention to kill the defendant; had announced the intention to lie in wait for the defendant; had secured possession of a shotgun, and had embarked on a search for the defendant. While this evidence is not as complete as it could have been, we are of the opinion that it presented a sufficient predicate, and that the trial court erred in sustaining the objection to the defendant's testimony.").

16 Arias v. State, 20 So. 3d 980 (Fla. 3d DCA 2009) (Quoting Text with Approval).

17 Hedges v. State, 667 So. 2d 420, 423 (Fla. 1st DCA 1996) (Defendant's testimony that the victim threatened to beat up the defendant and punched her was sufficient evidence of an overt act.); E.B. v. State, 531 So. 2d 1053, 1054 (Fla. 3d DCA 1988) (Evidence of

victim's reputation as a fighter and of his prior threats against juvenile were admissible since there had been a showing of the victim's overt acts showing the need to act in self-defense.); Sanchez v. State, 445 So. 2d 1, 2 (Fla. 3d DCA 1984).

18 See B.B. v. State, 86 So. 3d 1216, 1218 (Fla. 3d DCA 2012) (Error to preclude defendant from explaining that because her mother "had in the past abused her, pulling her hair out by the roots and scratching and cutting her, she was fearful during the current altercation thereby justifying the amount of force used against her mother."); Hughes v. State, 36 So. 3d 816 (Fla. 1st DCA 2010) (In prosecution for aggravated battery where self defense was alleged, error to exclude evidence of defendant's knowledge of victim's prior acts of violence against others. "[T]he evidence was not hearsay and that it was admissible to show that he knew of his girlfriend's propensity for violence. When a defendant raises self-defense, evidence of specific prior acts of violence by the victim, which were known to the defendant, is admissible to show the reasonableness of the defendant's apprehension at the time of the incident."); Streitch v. State, 987 So. 2d 761 (Fla. 4th DCA 2008) (Evidence of prior incidents at store where defendant worked was inadmissible where there was no evidence defendant knew about these incidents. Citing Text.); Grace v. State, 832 So. 2d 224, 226 (Fla. 2d DCA 2002) (In battery prosecution, where accused asserted self-defense to being threatened with a beer bottle, error to exclude testimony of prior incident when defendant had taken beer bottle away from victim who was attempting to use it in an altercation with a third party. The evidence was relevant to the reasonableness of the defendant's apprehension.); Johnson v. State, 718 So. 2d 848, 849 (Fla. 5th DCA 1998) (Contents of victim's school and police records were not admissible to bolster defendant's self-defense claim because there was no evidence that the defendant was aware of the acts described in the records.); Hedges v. State, 667 So. 2d 420, 423 (Fla. 1st DCA 1996) (When defendant has knowledge of victim's prior acts of violence, evidence of prior acts is admissible to show that the defendant was reasonably apprehensive of imminent danger of sustaining great bodily harm.); Lorano v. State, 584 So. 2d 19, 23 (Fla. 3d DCA 1991) (In manslaughter prosecution where self-defense was alleged, trial court properly granted state's motion in limine regarding one victim's previous drug arrests and another's drug use and possession: "A defendant who asserts that he acted in self-defense, must lay a proper foundation before presenting evidence of the victim's character. The victim's character becomes relevant to resolve an issue as to the reasonableness of the defendant's fear at the time of the incident.

Evidence of a deceased's violent character is admissible if an issue exists as to whether the victim was the first aggressor, or the reasonableness of the defendant's belief concerning imminent danger from the deceased.

Evidence regarding prior arrests and bad acts of a victim is also admissible to show a reasonable apprehension of harm on the part of the defendant. However, evidence of prior arrests and bad acts is not admissible where, as here, a defendant has no knowledge of the matters sought to be introduced."). See State v. Smith, 573 So. 2d 306, 318 (Fla. 1990) (Trial court erred when it did not allow other witness to testify as to specific acts of violence allegedly committed by the victim and known to those witnesses: "A defendant's testimony that he or she knew about specific acts of violence committed by the victim is relevant to show ... the reasonableness of the defendant's apprehension to support a self-defense claim .... Testimony that other people knew of specific acts of violence committed by the victim is not relevant because it sheds no light on the defendant's state of mind; it shows only that the victim had a propensity for violence .... Although reputation evidence may be valid for that purpose, 'specific act' evidence is not ....

However, 'specific act' testimony of third parties may be admissible as corroborative evidence if it is first shown that the defendant knew about the very same acts of violence. Such corroborative evidence should be admitted cautiously in light of the need to limit evidence of specific acts because, inter alia, a jury may tend to give the evidence too much weight, or it may sidetrack the jury's focus."). Munoz v. State, 45 So. 3d 954 (Fla. 3d DCA 2010) (Testimony concerning the victim's reputation for carrying a gun was inadmissible to show that the defendant's fear of the victim was reasonable when there was no evidence that the defendant was aware of that reputation.) See also Dowe v. State, 39 So. 3d 407 (Fla. 4th DCA 2010) (The dangerousness of the neighborhood in which the crime occurred was not relevant to the defendant's self-defense claim because the testimony of the defendant concerning how the crime occurred focused almost entirely on the actions of the victim. If the character of the neighborhood was relevant to the defendant's state-of-mind, the evidence would have been inadmissible under section 90.403.).

19 3 Weinstein, Evidence § 404[06].

20 Wright and Graham, Federal Practice and Procedure: Evidence § 5237.

21 West's F.S.A. § 794.022. See § 404.7 of the Text.

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West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.404

90.404. Character evidence: when admissible

Effective: October 1, 2014
Currentness

(1) Character evidence generally.--Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion, except:

(a) *Character of accused.*--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the trait.

(b) *Character of victim.*--

1. Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) *Character of witness.*--Evidence of the character of a witness, as provided in ss. 90.608-90.610.

(2) Other crimes, wrongs, or acts.--

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 787.025(2)(c), s. 787.06(3)(g), former s. 787.06(3)(h), s. 794.011, excluding s. 794.011(10), s. 794.05, former s. 796.03, former s. 796.035, s. 800.04, s. 827.071, s. 847.0135(5), s. 847.0145, or s. 985.701(1) when committed against a person 16 years of age or younger.

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(c) 1. In a criminal case in which the defendant is charged with a sexual offense, evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense is admissible and may be considered for its bearing on any matter to which it is relevant.

2. For the purposes of this paragraph, the term "sexual offense" means conduct proscribed by s. 787.025(2)(c), s. 787.06(3)(e), (d), (f), or (g), former s. 787.06(3)(h), s. 794.011, excluding s. 794.011(10), s. 794.05, former s. 796.03, former s. 796.035, s. 825.1025(2)(b), s. 827.071, s. 847.0135(5), s. 847.0145, or s. 985.701(1).

(d) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), paragraph (b), or paragraph (c), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) Nothing in this section affects the admissibility of evidence under s. 90.610.

Credits

Laws 1976, c. 76-237, § 1. Amended by Laws 1990, c. 90-40, § 2, eff. June 1, 1990; Laws 1993, c. 93-156, § 26, eff. Oct. 1, 1993; Laws 1995, c. 95-147, § 473, eff. July 10, 1995; Laws 2001, c. 2001-221, § 1, eff. July 1, 2001; Laws 2008, c. 2008-172, § 9, eff. Oct. 1, 2008; Laws 2011, c. 2011-220, § 2, eff. July 1, 2011; Laws 2012, c. 2012-97, § 14, eff. July 1, 2012; Laws 2014, c. 2014-160, § 15, eff. Oct. 1, 2014.

Editors' Notes

LAW REVISION COUNCIL NOTE--1976

Character questions arise in two fundamentally different ways. When the character of a person is an issue in the litigation because it is an element of a crime, claim, or defense, evidence concerning the person's character is admissible. For example, the reputation of a plaintiff in a libel action, the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, and the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver are situations in which the character of the person is an issue in the litigation and is admissible. There is no provision specifically limiting the admissibility of this evidence. The allowable methods of proof are set forth in § 90.405.

When character evidence is offered for the purpose of inferring that the person acted in conformity with his character during the occasion in question, this section limits the use of character evidence for this purpose and is basically a codification of existing Florida case law. The Florida Supreme Court has upheld the rejection of "certain proffered evidence and testimony which tended to show the plaintiff to be of bad moral character," when the moral character of the plaintiff was not at issue. Pantiola v. Fonseca, 145 Fla. 395, 199 So. 358, 360 (1940). However, the court has recognized the subsection (1)(a) exception in Norman v. State, 156 So.2d 186, 189 (Fla.3rd Dist. 1963), where it was stated that:

The general rule, and the one recognized in Florida is that the accused in a criminal prosecution may introduce evidence of his good character and reputation where such evidence has reference to the *trait* involved in the offense with which the defendant is charged. (Emphasis added.)

In Young v. State, 141 Fla. 529, 142 Fla. 361, 195 So. 569 (1939) it was further explained that:

the doctrine has been established beyond question that a defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced.

See Williams v. State, 110 So.2d 654 (Fla.1959), certiorari denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86.

In Nickels v. State, 90 Fla. 659, 106 So. 479, 481 (1925) the Court recognized the Section 90.404(1)(b) exception when it stated that:

Where . . . the defense [to a charge of rape] rests upon the fact of consent, evidence of the general reputation of the prosecutrix for unchastity, within recognized limits, is competent evidence as bearing upon the probability of her consent to the act with which the defendant is charged.

The admissibility of character evidence concerning a witness is explained in detail in §§ 90.608-90.610.

Section 90.404(2)(a) was amended by the Committee Substitute adopted by the Senate Committee on the Judiciary-Criminal to closely paraphrase the language used in Williams v. State, 110 So.2d 654, 663 (Fla.1959), certiorari denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86. There the court, in finding admissible evidence relating to the commission by the defendant of another crime, stated:

Evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. This rule we hold applies to relevant similar fact evidence . . . even though it points to the commission of another crime.

This decision has been interpreted in Green v. State, 190 So.2d 42, 46 (Fla.2nd Dist. 1966) to mean that evidence of other offenses is admissible if:

(1) it is relevant and has probative value in proof of the instant case or some material fact or facts in issue; and

(2) its sole purpose is not to show the bad character of the accused; and

(3) its sole purpose is not to show the propensity of the accused to commit the instant crime charged; and

(4) its admission is not precluded by some other specific exception or rule of exclusion.

The other crimes, etc., may be both prior and subsequent to the crime at issue. Tolley v. State, 36 So.2d 201 (Fla.1948); Andrews v. State, 172 So.2d 505 (Fla.1st Dist. 1965). Whether evidence of a crime on which there has been an acquittal is admissible under this section is not settled. Compare Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972) (evidence inadmissible) with Davis v. State, 277 So.2d 311 (Fla.4th Dist. 1973) and Blackburn v. State, 208 So.2d 625 (Fla.3rd Dist. 1968) (evidence admissible).

In order to insure that the use of testimony of prior crimes is not abused, the use of proof of other crimes by the State in a criminal prosecution is limited to instances in which the State makes the preliminary showing required by subsection (2)(b).

The procedure, which requires the state to give notice before the trial of its intent to use *Williams* rule evidence, was adopted from a similar Louisiana statute. The House Judiciary Committee amended the provision to its present form. The Senate Committee on the Judiciary-Criminal added the requirement that before the court is required to give a limiting instruction there must be a request by counsel.

Notes of Decisions (2013)

West's F. S. A. § 90.404, FL ST § 90.404
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West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.405

90.405. Methods of proving character

Currentness

(1) Reputation.--When evidence of the character of a person or of a trait of that person's character is admissible, proof may be made by testimony about that person's reputation.

(2) Specific instances of conduct.--When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of that person's conduct.

Credits

Laws 1976, c. 76-237, § 1; Laws 1978, c. 78-361, § 7. Amended by Laws 1995, c. 95-147, § 474, eff. July 10, 1995.

Editors' Notes

LAW REVISION COUNCIL NOTE--1976

This section deals only with allowable methods of proving character, not with the admissibility of character evidence which is covered in § 90.404.

In recognizing opinion as a means of proving character, the rule departs from the usual contemporary practice which is followed in Florida, which limits the testimony to reputation. Maley v. State, 52 Fla. 101, 41 So. 791 (1906); Fla.Stat. § 90.08. Dean Wigmore points out that the earlier practice permitted opinion and argued strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.' " 7 Wigmore, *Evidence* § 1986 (3rd ed. 1940). If character is defined as the kind of person one is, then account must be taken of varying methods of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion. Opinion is recognized as being generally as reliable as reputation.

Both the Model Code of Evidence Rules 305 and 306 and Uniform Rules 46 and 47 [1953] recognize the use of opinion to prove character. Recently enacted evidence codes in California, Kansas, and New Jersey all recognize the use of opinion evidence in proving character (Calif.Evid.Code § 1100, Kansas Code of Civ.Pro. § 60-446 and New Jersey Evid.Rule 46). See Fed.Rule Evid. 405.

The section confines the use of specific instances of conduct to cases in which character is in issue; that is, when character is one of the facts necessary to establish a liability or defense or is a factor in the measurement of damages. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. Of the three methods of proving character provided by this section, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, confuse,

surprise, or consume time. Consequently, the use of evidence of this kind is confined to cases in which character is, in the strict sense, in issue, and hence deserving of a searching inquiry. This treatment of specific instances of conduct, as well as the treatment of reputation, follows conventional contemporary common-law doctrine.

The following language from Nickels v. State, 90 Fla. 659, 687, 106 So. 479, 489 (1925) illustrates the conventional doctrine in a situation where character is in issue:

Where, however, the defense rests upon the fact of consent, evidence of the general reputation of the prosecutrix for unchastity, within recognized limits, is competent evidence as bearing upon the probability of her consent to the act with which the defendant is charged. Such evidence, however, must be confined to the general reputation of the prosecutrix for chastity, except that she may be interrogated as to her previous intercourse with the defendant or as to promiscuous intercourse with other men, or common prostitution.

However, if the defendant only places in issue his general reputation for being a peaceful and law-abiding citizen, it is error to allow the prosecution to introduce rebuttal evidence of specific acts of violence or turbulence. See Cornelius v. State, 49 So.2d 332 (Fla.1950).

Where character is only circumstantially relevant, inquiry is allowable on cross-examination as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. As stated in Cornelius v. State, 49 So.2d 332, 335 (Fla.1950):

We hold that a witness who has testified as to general reputation or character may on cross examination be interrogated as to whether he had ever known or heard of specific acts of violence committed by the accused because the true purpose of such cross examination is to enlighten the jury as to whether the witness actually--as a matter of fact--knows the general reputation of the defendant and to place the jury in a better position to pass upon the credibility of the witness' testimony.

Commentary on 1978 Amendment

This amendment eliminates opinion testimony as a method of proving character. When character is properly at issue under Sections 90.404 and 90.608, it may be proved by the testimony of a witness concerning the person's reputation in the community for a particular character trait, but not by a witness's opinion as to that trait. Pre-Code law was retained. See Maloy v. State, 52 Fla. 101, 41 So. 791 (1906). A similar amendment was made to Section 90.609.

This amendment also struck the language specifically authorizing inquiry into relevant specific instances of conduct when cross-examining a character witness. Striking this language should not change the existing law which allows inquiry into whether the witness has heard that the defendant committed certain acts. Fine v. State, 70 So. 379 (Fla.1915); Cornelius v. State, 49 So.2d 332 (Fla.1950). For example, the witness can be asked if he has heard that the defendant was arrested for robbery. If the witness has not heard the comment and speculation which resulted from the defendant's arrest, the jury may doubt whether the witness is capable of giving reliable testimony as to the person's reputation.

Since the subject of the inquiry is what is being said about the individual, the proper question on cross-examination is "Have you heard that . . .", not "Did you know that . . .." See Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Ehrhardt, Florida Evidence § 405.1 (1977).

Notes of Decisions (114)

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West's F. S. A. § 90.405, FL ST § 90.405
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West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.608

90.608. Who may impeach

Currentness

Any party, including the party calling the witness, may attack the credibility of a witness by:

(1) Introducing statements of the witness which are inconsistent with the witness's present testimony.

(2) Showing that the witness is biased.

(3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

(4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.

(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

Credits

Laws 1976, c. 76-237, § 1; Laws 1978, c. 78-361, § 14. Amended by Laws 1990, c. 90-174, § 1, eff. Oct. 1, 1990; Laws 1995, c. 95-147, § 488, eff. July 10, 1995.

Editors' Notes

LAW REVISION COUNCIL NOTE--1976

Subsection (1) This section retains the traditional rule against impeaching a party's own witness and enumerates the methods of attacking witness credibility. See McCormick, *Evidence* §§ 32, 38 (2nd ed. 1972)

Subsection (2) Under existing law, Fla.Stat. § 90.09, when a witness produced by a party proves adverse, the witness may be impeached by prior inconsistent statements and other contradictory evidence, but not by general evidence of bad character. The application of the statute has been limited by judicial interpretation. It has been applied only to adverse witnesses who give "evidence that is prejudicial to the party producing the witness." Johnson v. State, 178 So.2d 724, 728 (Fla.2nd Dist. 1965). Thus if the witness fails to give the testimony expected of him, the statute is not applicable unless the testimony given is also prejudicial. Hernandez v. State, 156 Fla. 356, 22 So.2d 781 (Fla.1945). Moreover, the party seeking to impeach his own witness must be surprised or entrapped by the testimony. Foremost Dairies, Inc. of South v. Cutler, 212 So.2d 37 (Fla.4th Dist. 1968). This subsection eliminates the necessity of surprise in order to use prior inconsistent statements to impeach an adverse witness.

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Florida Rule of Civil Procedure 1.450(a) provides that a party may call **as** a witness an adverse *party* (or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party) and interrogate, contradict and impeach him in all respects as if he had been called by the adverse party. The adverse party is treated as if he had been previously called by his own counsel and the testimony is treated as if it were cross-examination. See Wigginton, *New Florida Common Law Rules*, 3 U.Fla.L.Rev. 1, 26 (1950). Apparently, the scope of impeachment of an adverse party is that of any other witness upon cross-examination and is not limited to inconsistent statements or by the doctrines of surprise and prejudice. *Cf.* Foremost Dairies, Inc. of South v. Cutler, 212 So.2d 37 (Fla.4th Dist. 1968).

This section does not eliminate the limitation on impeachment stated in Johnson v. State, 178 So.2d 724, 729 (Fla.2nd Dist. 1965):

Where it is sought to impeach a witness on the basis of testimony given on cross-examination, the testimony must, of course, be relevant and material. . . . [T]he test of relevancy and materiality is whether the cross-examining party could have, for any purpose other than impeachment, introduced evidence on the subject in chief.

See Tully v. State, 69 Fla. 662, 68 So. 934 (1915); Lockwood v. State, 107 So.2d 770 (Fla.2nd Dist. 1959). On cross-examination of a witness on collateral or irrelevant matters the answer given by the witness is conclusive and it is error to permit opposing counsel to introduce evidence contradicting the witness's answer. See State v. Statewright, 300 So.2d 674 (Fla.1974).

Section 90.10 of the existing law permits impeachment of witnesses by prior inconsistent statements if certain prerequisites are met. Section 90.614 of this Act covers these matters.

Commentary on 1978 Amendment

Subsection (1) Paragraph (d) was amended to add that a witness may be impeached by showing a defect in his "ability or opportunity" to observe, remember or recount the matters about which he testified. This amendment conforms the Code to the provisions of the Florida Standard Jury Instruction in Criminal Cases No. 2.13(b) and the Florida Standard Jury Instruction (in Civil Cases) No. 2.2.

Subsection (2) This subsection was amended to provide that a party "calling" an adverse witness may impeach him under certain circumstances. The word "calling" was substituted for the word "producing" to conform the language of Subsection (2) to that of Subsection (1).

The final sentence of the subsection was added to clarify that when a party has called a witness who is adverse, he may examine him with leading questions.

Notes of Decisions (755)

West's F. S. A. § 90.608, FL ST § 90.608
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West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.609

90.609. Character of witness as impeachment

Currentness

A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:

(1) The evidence may refer only to character relating to truthfulness.

(2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

Credits

Laws 1976, c. 76-237, § 1; Laws 1978, c. 78-361, § 15.

Editors' Notes

LAW REVISION COUNCIL NOTE--1976

Section 90.404 provides that evidence of a person's character is only admissible in the instances enumerated therein. This section develops the exception involving permitting the credibility of a witness to be attacked by evidence of his truth and veracity, rather than evidence of general moral character. See Pandula v. Fonseca, 145 Fla. 395, 199 So. 353 (1941); Taylor v. State, 139 Fla. 542, 190 So. 691, 694 (1939); Andrews v. State, 172 So.2d 505 (Fla.1st Dist. 1965); Fla.Stat. § 90.05.

The credibility of a witness may not be supported by evidence until such time as the witness's credibility is attacked, Williams v. State, 110 So.2d 654 (Fla.1959); Andrews v. State, 172 So.2d 505 (Fla.1st Dist. 1965). See 4 Wigmore, *Evidence* §§ 1104-09 (Chadbourn rev.1972). If an accused testifies in his own behalf, under Section 90.608 his credibility may be attacked by showing that he had been previously convicted of certain crimes.

The use of opinion as well as reputation testimony is consistent with § 90.405.

Commentary on 1978 Amendment

This amendment eliminates opinion as a permissible method of proving the truthful character of a witness. It may only be proved by reputation testimony. A similar amendment was made to Section 90.405.

Notes of Decisions (76)

West's F. S. A. § 90.609, FL ST § 90.609
Current through Ch. 255 (End) of the 2014 2nd Reg. Sess. and Sp. "A" Sess. of the Twenty-Third Legislature

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172 So.2d 505
District Court of Appeal of Florida, First District.

Herbert D. ANDREWS, Appellant,
v.
STATE of Florida, Appellee.

No. F–392. | March 2, 1965.

Prosecution for a crime against nature. Upon jury verdict of guilty, the Criminal Court of Record, Duval County, Hans G. Tanzler, J., entered judgment and defendant appealed. The District Court of Appeal, Sturgis, C. J., held that permitting prosecuting attorney to elicit on cross-examination, over objection, that defendant had been dishonorably discharged from military service by reason of homosexual activity was reversible error where defendant had not first put his good character in issue.

Reversed.

West Headnotes (9)

[1] Criminal Law
⇐ Examination of witnesses

Judge's interrogation of witnesses to clarify issues, conducted within bounds of judicial authority, did not present ground for reversal.

3 Cases that cite this headnote

[2] Criminal Law
⇐ Other Misconduct as Evidence of Offense Charged in General

Criminal Law
⇐ Purposes for Admitting Evidence of Other Misconduct

Collateral evidence that tends to suggest commission of an independent crime must be excluded, except where it tends to prove criminal intent, guilty knowledge, purpose, plan or design or to show that act charged was not result of accident, mistake or inadvertence.

3 Cases that cite this headnote

[3] Criminal Law
⇐ Sex offenses

Criminal Law
⇐ Misconduct subsequent to charged offense

Similar fact evidence that defendant charged with a crime against nature had, a few months after offense charged, allegedly committed homosexual acts on person of witness, who was in same age group as victim named in charge, at same place and under circumstances almost identical to those connected with that offense, was admissible as to defendant's identity, intent, plan and design.

6 Cases that cite this headnote

[4] Criminal Law
⇐ Witnesses

Witnesses
⇐ Particular acts or facts

Permitting prosecuting attorney to elicit on cross-examination, over objection, that defendant charged with a crime against nature had been dishonorably discharged from military service by reason of homosexual activity was reversible error where defendant had not first put his good character in issue.

3 Cases that cite this headnote

[5] Criminal Law
⇐ Character or Reputation of Accused

State cannot introduce evidence attacking character of accused unless he has first put his good character in issue.

1 Cases that cite this headnote

[6] Criminal Law
⇐ Error cured by rulings and instructions of court

Prejudice from wrongful bringing out of testimony as to defendant's dishonorable discharge from military service for homosexual activity was not cured by jury instruction that testimony touched only upon defendant's veracity and his truthfulness as witness.

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Cases that cite this headnote

[7] Witnesses
⇐ Character and reputation in general
Witnesses
⇐ Reputation as to veracity

General reputation of witness for truth and veracity may be shown, but inquiries relative to her general moral behavior are improper.

1 Cases that cite this headnote

[8] Witnesses
⇐ Particular Acts or Facts

Evidence of particular acts of misconduct may not be introduced to impeach credibility of witness.

3 Cases that cite this headnote

[9] Witnesses
⇐ Particular acts or facts

Testimony, on direct examination of defendant charged with a crime against nature, that in military service he was engaged as a cook did not, on any theory that it implied good character, open door on cross-examination to elicit from him fact that his discharge from military had been dishonorable by reason of his homosexual activity.

2 Cases that cite this headnote

Attorneys and Law Firms

***506** T. Edward Austin, Jr., Public Defender, for appellant.

Earl Faircloth, Atty. Gen., and James G. Mahorner, Asst. Atty. Gen., for appellee.

Opinion

STURGIS, Chief Judge.

Appellant was tried by jury, found guilty and convicted of a crime against nature. His points on appeal are: (1) That the jury was prejudiced by the trial judge's interrogation of the witnesses. (2) That it was error to permit the state to present testimony to effect that subsequent to commission of the crime with which defendant was charged he committed a similar offense on the person of the witness who testified thereto. (3) That it was error to permit the state over objection to elicit from the defendant on cross-examination testimony that defendant had been dishonorably discharged from military service because of homosexual acts.

[1] We find no merit to the grounds for reversal asserted by the first point. The trial judge's interrogation of witnesses was of such nature as to clarify the issues and was conducted within the bounds of his judicial authority. See Clark v. State, 122 Fla. 310, 165 So. 44 (1935), and Williams v. State, 143 So.2d 484 (Fla.1962).

[2] Appellant's second point is likewise without merit. The general rule in this jurisdiction requires exclusion of collateral evidence that tends to suggest the commission of an independent crime. It has been subordinated, however, to numerous exceptions which permit the use of evidence that tends to prove criminal intent, guilty knowledge, purpose, plan or design, or to show that the act charged was not the result of accident, mistake or inadvertence.

The effect of these broad exceptions has been to effectuate a rule of admissibility, subject only to specific rules excluding such evidence in certain areas that are not germane to the immediate discussion. See Williams v. State, 110 So.2d 654 (Fla.1962), in which the court stressed the importance of relevancy of the similar fact evidence as regards the factual issue being tried. In that case the defendant was on trial for rape. Evidence was admitted showing that the defendant, some six weeks prior to the rape in question, had attempted to assault another female under similar circumstances. The Florida Supreme Court held such evidence was properly admitted to establish a plan, scheme or design.

In Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948), the prosecution was allowed to elicit the testimony of five women other than the vitim, showing that on three occasions prior and *two occasions subsequent to the date of the alleged offense*, the defendant approached the other women in a manner similar to his approach to the prosecutrix. In Talley the Florida Supreme Court said:

'Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the

defendant's guilt the crime charged. *Subsequent as well as prior* ***507** *collateral offenses can be put in evidence and from such system, identity or intent can often be shown.* Like crimes, committed against the same class of persons, at about the same time, tend to show the same general design and evidence of the same is relevant and may lead to proof of identity.' (Emphasis supplied.)

[3] In the instant case a witness for the state testified, over objection of the defendant, that defendant had committed homosexual acts on his person a couple of months after the date of the offense for which defendant was on trial. The offense committed on this witness was similar in nature to that committed on the person named in the charge. The testimony concerning the subsequent offense is to the effect that it was committed against a person in an age group comparable to that of the victim named in the charge, at the same place, and under circumstances almost identical to those connected with the offense charged. The similar fact evidence in this cause was clearly relevant in its bearing on the defendant's identity, intent, plan and design, as well as to show lack of inadvertence, and it meets the test of admissibility. See also Norris v. State, 158 So.2d 803 (Fla.App.1964). The fact that it related to an offense committed shortly after the offense charged does not under the circumstances of this case impair its use.

[4] [5] Turning to appellant's third contention, we hold that it was reversible error to permit the prosecuting attorney, over objection of counsel for appellant, to elicit from the appellant on cross-examination that he had been dishonorably discharged from military service and that the reason for such discharge was his homosexual acts. It is a general rule in criminal cases that the state cannot introduce evidence attacking the character of the accused unless he has first put his good character in issue. See 13 Fla.Jur. 156; 20 Am.Jur. 303.

Proof of an honorable discharge from military service is generally considered inadmissible for proving good character of a defendant in a criminal proceeding. See 9 A.L.R.2d 611. For the same reason evidence of a dishonorable discharge has been held inadmissible to prove bad character. Likewise, evidence of specific bad acts or conduct of a defendant while in the military service which tends to discredit him has been generally considered inadmissible. See 9 A.L.R.2d 613. This is not to say that relevant acts of the defendant during military service may not be shown by the prosecution pursuant to the hereinabove discussed similar-fact rule.

[6] [7] [8] The trial court gave the following instruction to the jury with respect to the testimony thus elicited from the accused, but the charge is incompetent to cure the prejudice which is presumed to have been born as the result of wrongfully bringing out such testimony:

'Now, while the defendant was on the stand I believe some statement was made by him to the effect that he had received a particular type discharge which was for homosexual purposes. Now, this was allowed to go before you, Gentlemen, not that it proves he was guilty of this charge, but only that it affects his credibility as a witness. You are not to judge this case on what may have been the case at the time of his discharge or at the time of his admission. It goes before you as it touches upon his veracity and his truth-fulness as a witness and nothing else.'

Although the general reputation of a witness for truth and veracity may be shown, it is improper to allow inquiries relative to the general moral character of the witness. Also, evidence of particular acts of misconduct may not be introduced to impeach the credibility of a witness. See 35 Fla.Jur., 316–317, 58 Am.Jur. 392.

[9] Appellee insists that the subject evidence was admissible because the defendant ***508** had testified on direct examination that he was engaged as a cook during military service and that his purpose was to produce an inference that he was an unlikely person to commit the crime charged. Appellee's position is entirely too nebulous to form the basis of an exception to the well-established rule.

For the reason stated, the judgment appealed is reversed and this cause is remanded for proceedings consistent herewith.

Reversed.

RAWLS, J., and PATTEN, GEORGE L., Associate Judge, concur.

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382 So.2d 1205
Supreme Court of Florida.

Anthony ANTONE, Appellant,
v.
STATE of Florida, Appellee.

No. 50240. | March 27, 1980.
| Rehearing Denied May 21, 1980.

Defendant was convicted before the Circuit Court, Hillsborough County, Herboth S. Ryder, J., of murder in the first degree, the trial judge imposed the death sentence, and defendant appealed. The Supreme Court held that: (1) search of defendant's house was not improper; (2) defendant's statements were admissible; (3) testimony implicating defendant in other crimes was properly allowed; (4) inquiry concerning State's witness' character was properly limited; (5) trial court properly denied motion to compel disclosure of confidential informant; (6) motion to dismiss indictment was properly denied; (7) death penalty statute is not unconstitutional; (8) defendant was not entitled to a new trial on basis of newly discovered evidence; and (9) death sentence was properly imposed.

Affirmed.

West Headnotes (33)

[1] Searches and Seizures
⇐ False, inaccurate or perjured information; disclosure

Fact that supporting affidavit for search warrant alleged that defendant kept counterfeit currency in his home and no counterfeit money was found as a result of the search did not render search warrant invalid, where there was no showing that statement concerning counterfeit money was intentionally or falsely made and where, even if such statement were excised, remainder of the affidavit was sufficient to establish probable cause.

2 Cases that cite this headnote

[2] Searches and Seizures
⇐ Reliability or credibility; corroboration

Aguilar-Spinelli test requires that warrant which is based on informant's tip must establish that information provided by informant, if true, is sufficient to support finding of probable cause, and that affidavit must establish that informant is credible or his information is reliable.

2 Cases that cite this headnote

[3] Searches and Seizures
⇐ Particular concrete applications

Allegations in affidavit supporting search warrant that projectiles fired from murder weapon would be found in couch or wall in defendant's home and that counterfeit money was kept by defendant in his home established probable cause to support search warrant.

Cases that cite this headnote

[4] Searches and Seizures
⇐ Reliability or credibility; corroboration

Affidavit which revealed both source of information of informant, who confessed to his part in murder and who stated that he was present when victim was murdered with .32-automatic pistol, and which alleged that projectiles fired from murder weapon would be found in a couch or wall in defendant's home and that counterfeit money was kept by defendant in his home, and corroborating evidence found by independent investigations, which included test revealing that bullet recovered from victim's body had been fired from a .32-calibre pistol, was legally sufficient for issuance of search warrant for defendant's home.

1 Cases that cite this headnote

[5] Searches and Seizures
⇐ Places, persons, and things within scope of warrant

Shed behind defendant's house was proper subject of search warrant which described place to be searched as including "curtilage," notwithstanding fact that blue fiber which was used to pack silencer of murder weapon, and

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which was found in shed was not described in the search warrant.

Cases that cite this headnote

[6] **Searches and Seizures**
⇐ Places, persons, and things within scope of warrant

Term "curtilage" encompasses workshed used in connection with a dwelling, for purposes of search pursuant to properly issued warrant.

4 Cases that cite this headnote

[7] **Criminal Law**
⇐ Physical Condition

Criminal Law
⇐ Particular cases

Fact that defendant suffered heart attack on the night of his arrest did not prevent his appreciation of *Miranda* warnings, create coercive atmosphere, or preclude admission of his incriminating statements, which were made before he began to complain of discomfort and following the administration of warnings.

Cases that cite this headnote

[8] **Criminal Law**
⇐ Voluntariness in General

Voluntary statements are not barred from admissibility by the Fifth Amendment. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[9] **Criminal Law**
⇐ Physical Condition

Defendant's statement on night of his arrest that "Sicilians do not fink," which was made after his admission to hospital following mild heart attack, and after doctor advised police officers it would be all right to speak with defendant, was voluntary and admissible. U.S.C.A.Const. Amend. 5.

4 Cases that cite this headnote

[10] **Constitutional Law**
⇐ Determination of admissibility; suppression

Criminal Law
⇐ Determination; ruling or order

Ideally, trial judge should specify his conclusions concerning voluntariness of disputed confession or inculpatory statement; however, due process is not offended when issue of voluntariness is specifically before judge and he determines that the statements are admissible without using word "voluntary." U.S.C.A.Const. Amends. 5, 14.

8 Cases that cite this headnote

[11] **Criminal Law**
⇐ Findings

Where only issue before court at suppression hearing was voluntariness of defendant's statements, and evidence clearly supported finding that such statements were free from coercion, trial judge's naked denial of the motion to suppress was not error.

2 Cases that cite this headnote

[12] **Criminal Law**
⇐ Statements asserting constitutional rights

Criminal Law
⇐ Effect of Failure to Object or Except

Testimony of agent that defendant told him that defendant was "100 percent Sicilian" and "Sicilians do not fink", which testimony was not objected to at trial, was permissible as it recounted defendant's affirmative statement, and did not constitute impermissible comment on defendant's decision to remain silent.

8 Cases that cite this headnote

[13] **Criminal Law**
⇐ Homicide, mayhem, and assault with intent to kill

In prosecution for murder, witness' testimony that defendant wanted witness to kill five men pertained to part of the primary arrangements for contract murder at issue and was therefore

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relevant to show existence of conspiracy to commit murder.

Cases that cite this headnote

[14] **Witnesses**
⇐ Reputation as to veracity

Trial court properly limited direct examination which sought to elicit individual and personal view of character witness as to State's witness' reputation for truth and veracity; overruling *Nelson v. State*, 32 Fla. 244, 13 So. 61 (1893) and *Robinson v. State*, 16 Fla. 835 (1878).

2 Cases that cite this headnote

[15] **Witnesses**
⇐ Reputation as to veracity

Only general reputation of witness in the community is admissible to impeach witness' reputation for truth and veracity.

Cases that cite this headnote

[16] **Criminal Law**
⇐ Witnesses

Where record reflected that witness was properly allowed to tell jury that State's witness' reputation for truth and veracity in the community was not good, State's witness' reputation was properly placed before jury and defendant was therefore not prejudiced by exclusion of question which sought to elicit individual and personal view of the character witness.

3 Cases that cite this headnote

[17] **Criminal Law**
⇐ Particular Cases

Defendant failed to sustain his burden of showing prejudice by nondisclosure of confidential informant, who was not present at any material point in the crime and did not testify at defendant's trial.

2 Cases that cite this headnote

[18] **Grand Jury**
⇐ Challenge to panel

More than mere conclusory statements are necessary to sustain defendant's challenge to selection of grand jury which indicted him. West's F.S.A. §§ 905.02–905.06.

Cases that cite this headnote

[19] **Grand Jury**
⇐ Nature and functions in general

Protections afforded by Bill of Rights do not attach in full to grand jury proceedings which are inquisitorial rather than adversary in nature.

Cases that cite this headnote

[20] **Grand Jury**
⇐ Conduct of proceedings in general

Grand Jury
⇐ Presence of accused or counsel

Defendant's rights to confront his accusers and to counsel and other constitutional rights were not violated by grand jury proceedings, which were inquisitorial rather than adversary in nature.

Cases that cite this headnote

[21] **Homicide**
⇐ Validity

Sentencing and Punishment
⇐ Constitutionality of death penalty

Sentencing and Punishment
⇐ Provision authorizing death penalty

First-degree murder statute and death penalty statute are not unconstitutional. West's F.S.A. §§ 775.082, 921.141.

Cases that cite this headnote

[22] **Criminal Law**
⇐ Impeachment of Witness

If prosecution knew or should have known of perjured testimony in its case and there was reasonable likelihood that the false testimony

could have altered jury's judgment, fundamental fairness mandates that new trial be granted.

2 Cases that cite this headnote

[23] **Criminal Law**
⇐ Misconduct of Counsel for Prosecution

Where questions asked of State's witness both in deposition and in trial were directed solely to plea bargain agreement, and State's witness' answers could fairly be characterized as truthful, State's failure to disclose information that Department of Criminal Law Enforcement had paid an attorney to represent State's witness did not mandate new trial.

Cases that cite this headnote

[24] **Criminal Law**
⇐ Misconduct of Counsel for Prosecution

If requested evidence is withheld by the prosecution following specific request by defendant and the evidence is "material," meaning that it might have affected outcome of the trial, new trial must be ordered.

Cases that cite this headnote

[25] **Criminal Law**
⇐ Misconduct of Counsel for Prosecution

Where defense counsel made only general demands for material or information within State's possession or control which tended to negate guilt of defendant and filed motion seeking disclosure of all evidence favorable to the defendant, State's failure to disclose that Department of Criminal Law Enforcement had paid attorney to represent its principal witness did not mandate ordering of new trial, since no specific request for such information was ever made by defense.

1 Cases that cite this headnote

[26] **Criminal Law**
⇐ Materiality

Where evidence that State Department of Criminal Law Enforcement had paid for attorney representation of its principal witness in no way detracted from testimony presented by State which established defendant's guilt beyond reasonable doubt, such evidence was useful for impeachment of principal witness and was not germane to defendant's guilt or innocence, other evidence tending to impeach principal witness was already before the jury and undisclosed evidence would have added little to defense efforts to show principal witness as unworthy of jury's belief, and there was no showing of conspiracy between principal witness' counsel and State, undisclosed evidence failed to meet standard of "materiality" and therefore new trial was not required.

Cases that cite this headnote

[27] **Sentencing and Punishment**
⇐ Scope of review

It is duty of Supreme Court to examine record to determine whether there are clear and convincing facts which warrant imposition of death penalty.

Cases that cite this headnote

[28] **Sentencing and Punishment**
⇐ Nature, degree, or seriousness of other offense

Trial court's finding that defendant had been convicted of two armed robberies which involved threat of violence to a person was appropriately "aggravating circumstance" justifying imposition of death penalty following defendant's conviction for first-degree murder. West's F.S.A. § 921.141(5)(b).

3 Cases that cite this headnote

[29] **Sentencing and Punishment**
⇐ Contract killing

Trial court's finding that first-degree murder had been committed for pecuniary gain in that defendant received at least $750 for his share of the contract killing was appropriate "aggravating circumstance" so as to warrant imposition of the death penalty. West's F.S.A. § 921.141(5)(f).

2 Cases that cite this headnote

[30] **Sentencing and Punishment**
⇐ Escape or other obstruction of justice

Trial court's finding that contract murder was committed to disrupt and hinder enforcement of laws in that it prevented victim from testifying before grand jury was appropriate "aggravating circumstance" justifying imposition of the death penalty. West's F.S.A. § 921.141(5)(g).

1 Cases that cite this headnote

[31] **Sentencing and Punishment**
⇐ Extent of offender's personal participation

Sentencing and Punishment
⇐ Contract killing

Defendant who was mastermind of contract killing, and who supplied the gun, paid money from his pocket, and pressured accomplice to complete the task, was not a minor participant or mere accomplice in capital felony committed by another person so as to mitigate sentence of death.

2 Cases that cite this headnote

[32] **Sentencing and Punishment**
⇐ Vileness, heinousness, or atrocity

Error in finding aggravating circumstance that murder was heinous, atrocious, or cruel does not invalidate imposition of the death sentence supported by other aggravating circumstances.

1 Cases that cite this headnote

[33] **Sentencing and Punishment**
⇐ Scope of review

Where trial court properly found three aggravating circumstances so as to warrant imposition of death penalty upon defendant following conviction for first-degree murder, and no mitigating circumstances were found, Supreme Court did not need to consider appropriateness of trial court's finding that the murder was heinous, atrocious, or cruel in determining propriety of the death sentence.

4 Cases that cite this headnote

Attorneys and Law Firms

***1208** Angelo M. Ferlita of Diecidue, Ferlita & Prieto, Tampa, for appellant.

Jim Smith, Atty. Gen., Charles Corces, Jr., Asst. Atty. Gen., Tampa and T. Edward Austin, State's Atty., Jacksonville, for appellee.

Opinion

PER CURIAM.

The appellant Anthony Antone was convicted of murder in the first degree. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation. We have jurisdiction. [1]

For the reasons expressed, we affirm this contract murder conviction and the imposition of the death sentence.

Our consideration of this cause was delayed by the remand for testimony on an application for new trial relative to an agreement made by the Florida Department of Criminal Law Enforcement (FDCLE) for attorney representation of the principal witness, Haskew, and the payment of $11,500 fee for attorney services. This agreement was unknown to either the prosecutor or defense counsel until this cause was on appeal to this Court. We find the conduct of the FDCLE improper but conclude there was no prejudicial error when we consider the totality of the record.

This murder was committed on the morning of October 23, 1975, when Detective Richard Cloud, a suspended Tampa police officer, was killed at the front door of his home. Antone's conviction was based on the fact that he was the mastermind of this execution slaying, and he directly hired the two men who carried out this contract murder. One of the men Antone hired, Ellis Marlow Haskew, was the primary witness for the state.

***1209** Haskew's trial testimony revealed the following material facts of this murder. Upon discharge from Florida

State Prison in May, 1975, Haskew returned to Tampa to live and to establish contact with Antone. In September, 1975, Haskew helped Benjamin Gilford to escape from prison, after which he had Gilford went to the Bradenton area to live. Immediately after this escape, Antone advised Haskew by telephone that he was looking for someone to perform five "installations," which Haskew defined as murders. Haskew and Gilford then traveled to Tampa where Antone personally informed Haskew that another man wanted five people killed, including Richard Cloud. Haskew accepted $1,750 in "front money" which was used in part to purchase a used Oldsmobile. In late September, 1975, he went to Antone's house and was given a .32 caliber automatic with an attached silencer to test. Although Antone previously had tested the gun himself, he wanted Haskew to check the effectiveness of the silencer. Haskew fired the gun twice into a rattan couch in Antone's home. After the testing, Antone repacked the silencer with fiber used in air conditioning filters which he stored in a shed behind his house.

In addition to supplying Haskew with the gun, Antone gave him a picture of Cloud and drove Haskew by Cloud's home. Approximately ten days before Cloud's death, Antone asked Haskew to complete his assignment because Cloud was due to testify before a grand jury about matters concerning Antone's friends. Haskew made final preparations for this murder by constructing a cardboard box to conceal the weapon, retesting the gun, which required more packing fiber from Antone, and obtaining ammunition from an outside party. On October 23, 1975, he and Gilford drove past Cloud's home and noticed that only Cloud's car was there. They circled the house, and Gilford left the vehicle. While Gilford entered the house, Haskew drove around the block. When he returned to pick Gilford up, he saw an ashtray fly out of the front door after Gilford. Haskew recalled that Gilford later explained that Cloud had thrown an ashtray or a plant at him as he fired at Cloud. Antone visited Haskew at his apartment later that day, gave him $200 to get Gilford out of town, and drove with Haskew to Gandy Bridge to dispose of the murder weapon in Tampa Bay. Haskew made several trips between Tampa and Miami in the ensuing days and received about $9,000 from Antone in several installments. It was also established that Antone personally received at least $750 for this contract murder.

On February 25, 1976, at approximately 8:30 a. m., Haskew was arrested in Miami. Although he initially denied involvement with the Cloud murder, later that day he admitted his participation and agreed to cooperate with law enforcement authorities. Haskew fully implicated Antone as the person who hired him and Gilford to murder Cloud. He also explained the telephone code arrangement which enabled Antone to determine the number from which Haskew was calling. Upon receiving the code, Antone would return the call to that number from a telephone booth. In cooperation with the FDCLE, Haskew called the appellant at approximately 8:30 p. m. that same day and used the code to have Antone return the call at a pay phone in the FDCLE building in Miami. The appellant Antone had been placed under surveillance at the time and was observed leaving his house and going to a pay phone booth around the corner. A recording made of the return call from Antone was later introduced into evidence.

Approximately an hour and a half later, at 10 p. m. on February 25, 1976, Antone was arrested at his home and taken to the office of the Federal Bureau of Investigation. While at that office, Antone complained of chest pains and discomfort. Antone was taken to the hospital where he was subsequently placed in the coronary care unit. At approximately 1:10 a. m. the following morning, with the approval of the attending physician, FBI agent Arwine entered Antone's hospital room. Arwine testified that "Mr. Antone told me that he was a hundred percent Sicilian and Sicilians do not fink."

***1210** In the afternoon of February 26, 1976, a search warrant was issued to search Antone's residence, including any vehicles, curtilages and appurtenances. The warrant sought from the premises "certain evidence, to wit: .32 caliber projectiles, couch, cushions, couch stuffing, and counterfeit currency." The affidavit in support of the warrant stated: (1) Richard Cloud was shot and killed on October 23, 1975, and evidence from the crime scene indicated that the shots fired were from a .32 caliber automatic pistol; (2) Ellis Marlow Haskew had been arrested and had admitted being present at the murder of Cloud by Benjamin Gilford, and that Gilford used a .32 automatic pistol given to Haskew by Antone; (3) prior to giving the pistol to Haskew, Antone tested the weapon by firing it into a couch in the den of his residence, and the fired projectiles were still in the couch, floor, or surrounding walls; (4) at the time of Antone's arrest, the arresting officer had seen a couch in those premises; and (5) Haskew had informed the affiant that Antone kept counterfeit money in the premises, and this appeared to be confirmed in a recorded conversation between Haskew and Antone which was overheard by the affiant.

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On February 26, 1976, a search of Antone's premises was conducted in accordance with the warrant at approximately 6:30 p. m. A bullet was recovered from a rattan couch which, when compared with the bullet removed from the left leg of Cloud, was found to have been fired from the same weapon. Identical comparisons were also made with other bullets found at Cloud's home, including spent bullets found on the carpet under the dining room table, beneath the couch, and under the house in a joist. In addition, the search produced blue air conditioning fibers which were seized from a work shed in the rear of Antone's house. Haskew had stated that these fibers were used to pack the silencer. Expert testimony indicated that these seized fibers compared favorably with fibers taken from the screen door at Cloud's house immediately following the murder.

In support of Haskew's testimony, a neighbor testified that he was standing in his carport and heard shots from the direction of Cloud's house. He looked up and saw a car with a driver in it. The engine was running and the passenger door was wide open. A few seconds later a man ran from Cloud's house with a brown cardboard box in his hand, jumped in the car, and sped off. The record further reflects that cardboard fragments were found near the screen door of Cloud's house, and four bullet holes were in the door. Cloud's mother testified that a week prior to her son's death a man whom she identified as the appellant Antone came to Cloud's home asking for him.

Antone testified in his own behalf and denied participation in this murder-for-hire scheme. Counsel for the appellant also presented testimony impeaching Haskew's reputation for truth and veracity. Haskew acknowledged during cross-examination that, with the advice of counsel, he had entered into a plea agreement with the state. Under the agreement Haskew would receive a thirty-five year sentence, and he expected to be eligible for parole in seven to eight years.

The jury returned a verdict of guilty and recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding as aggravating circumstances: (1) Antone had been convicted of two armed robberies which were felonies involving the use of threat of violence to another person; (2) this was a contract murder and therefore committed for pecuniary gain; (3) Antone ordered the execution of Cloud to disrupt and hinder the enforcement of laws; and (4) the murder was particularly heinous, cruel, and vicious. The trial judge found no mitigating circumstances.

While this cause was on appeal, the prosecuting attorney filed a motion to supplement the record which advised this Court that the FDCLE had paid substantial fees to attorneys for Ellis Marlow Haskew and that such information had not been previously known to the prosecuting attorney. In Antone v. State, 355 So.2d 777 (Fla.1978), *1211 we remanded this cause to the trial court for a determination of whether a violation prohibited by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), had occurred and whether a new trial should be granted. We advised the trial court that it should be guided by the materiality standards defined by the United States Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In a detailed order, the trial court denied a new trial. It found that the FDCLE had paid the sum of $11,500 for an attorney to represent Haskew, and that Haskew was aware of this fact. The trial court further found that the questions asked of Haskew, both in deposition and at trial, were directed solely to the plea bargain and were answered truthfully. The trial court concluded that there was no violation of the standards established by the United States Supreme Court in Brady v. Maryland and United States v. Agurs.

We will consider the issues raised in this appeal in three parts: (a) the trial phase, (b) the request for new trial on the grounds of newly discovered evidence, and (c) the appropriateness of the sentence.

A. Trial Phase

Antone contends his conviction should be set aside because: (1) the search of his house was improper; (2) his statements were inadmissible; (3) testimony relating to his silence was improperly admitted in evidence; (4) testimony implicating him in other crimes was improperly allowed; (5) inquiry concerning Haskew's character was improperly limited; (6) the trial court improperly denied his motion to compel disclosure of a confidential informant; (7) his motion to dismiss the indictment was improperly denied; and (8) Florida's death penalty statute is unconstitutional. For the reasons expressed, we reject each contention.

Validity of Search Warrant

[1] In challenging the validity of the search warrant, Antone asserts that the supporting affidavit contained material misrepresentations, contained an insufficient statement of

underlying facts, and lacked the requisite specificity in describing the scope of the search. The asserted misrepresentation is based on the statement that "Anthony Antone keeps counterfeit currency within the northeast bedroom door frame." Because no counterfeit money was found, Antone contends this statement was false and, therefore, the evidence obtained under the authority of the warrant must be suppressed. Although the state disputes the falsity of the allegations, we need not decide the issue of its truth or falsity. The issue is controlled by Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which held that where a defendant makes a preliminary showing that a false statement made knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the search warrant affidavit and the false statement was necessary to the finding of probable cause, and evidentiary hearing must be held. If during an evidentiary hearing the alleged perjury is established by preponderance of the evidence, the court must then excise the falsity from the affidavit and review the remainder of the affidavit to determine whether there remains sufficient grounds to establish probable cause. There was an evidentiary hearing in the instant case. There was no showing that the statement was intentionally and falsely made. In fact, during the suppression hearing counsel stated: "We don't suggest that the misrepresentation was intentional." Further, and most important, we find that even if the challenged statements were excised, the remainder of the affidavit is sufficient to establish probable cause.

[2] [3] [4] The appellant also attacks the search warrant on the basis that there are insufficient underlying facts to meet the tests set forth in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The Aguilar-Spinelli test requires that a warrant which is based on an informant's tip must: (1) establish that the information provided by the informant, if true, is sufficient to support a finding of probable cause, ***1212** and (2) the affidavit must establish that the informant is credible or his information is reliable. The allegations in the affidavit that projectiles fired from the murder weapon would be found in a couch or in a wall in Antone's home and that counterfeit money was kept by Antone in his home clearly establishes probable cause. Secondly, the credibility of Haskew's confession, that he was present when Richard Cloud was murdered with a .32 automatic pistol, was established when tests revealed that a bullet recovered from Cloud's body had in fact been fired from a .32 caliber pistol. Further, the affidavit's detailed description of Antone's home was in part corroborated by a police officer who recently had been at the home and had seen a couch located in precisely the place where Haskew described. The affidavit reveals both the source of Haskew's information and the corroborating evidence found by independent investigations. In our view, this affidavit meets both federal and state requirements and is legally sufficient.[2]

[5] [6] The appellant next contends that the admission into evidence of the blue fiber was improper because it was seized from the shed or workshop behind Antone's house and the description of the fiber was not included in the warrant. We disagree. The description of the place to be searched expressly included the term "curtilage." That term encompasses a workshed used in connection with a dwelling for the purposes of a search pursuant to a properly issued warrant. See Joyner v. State, 303 So.2d 60 (Fla. 1st DCA 1974); Phillips v. State, 177 So.2d 243 (Fla. 1st DCA 1965). We find that the shed was a proper subject of the search warrant, and, under the circumstances of this case, the seizure of the fiber was proper and reasonable.

Admissibility of Appellant's Statements

[7] Antone contends that several brief statements which he made following his arrest should have been suppressed because they were obtained in violation of his fifth amendment privilege against self-incrimination. On the night of his arrest, Antone suffered a mild heart attack which he claims prevented his appreciation of the Miranda warnings, created a coercive atmosphere, and precluded his statements from being genuinely voluntary. We reject these contentions and find that Antone's actions reflect a complete understanding of his situation. Immediately following the administration of the warnings and prior to his mild heart attack, he agreed to be interviewed and further agreed to speak with Haskew over the phone, at which time he continually repeated "Marlow, why did you do this to me?" Antone began to complain of discomfort only after the telephone conversation and an admission that he knew Haskew and two other men were the subject of an investigation.

[8] [9] Antone also challenges the admissibility of his statement made at the hospital, "Sicilians do not fink." This statement, however, appears from the record to be clearly voluntary and was made after a doctor advised officers it would be all right to speak with Antone. Voluntary

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statements are simply not barred from admissibility by the fifth amendment.

[10] [11] Antone next asserts that the trial judge's naked denial of the motion to suppress these statements mandates a reversal pursuant to McDole v. State, 283 So.2d 553 (Fla.1973). This Court, however, has modified the strict requirement that an express finding must appear in the record. See Wilson v. State, 304 So.2d 119 (Fla.1974); Henry v. State, 328 So.2d 430, 431 n.1. (Fla.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).[3] Ideally, *1213 the trial judge should specify his conclusions concerning the voluntariness of a disputed confession or inculpatory statement. However, due process is not offended when the issue of voluntariness is specifically before the judge and he determines that the statements are admissible without using the magic word "voluntary." The record reflects that the only issue before the court was the voluntariness of Antone's statements. The evidence clearly supports the finding that these statements were free from coercion. The resulting denial of the motion to suppress was thus not in error.

Comment on Silence

[12] Antone contends that the following testimony of Agent Arwine constitutes impermissible comment on Antone's decision to remain silent:

> I thereafter went into the room and was, during this period, from 1:10 until 1:20, the time I left the room, there was a nurse in and out of the room and Mr. Antone did not volunteer any information except he made one statement. Mr. Antone told me that he was a hundred percent Sicilian and Sicilians do not fink.

We find this testimony permissible as it recounted Antone's affirmative statement. In fact, Antone did not stand mute; Arwine's testimony comments not on Antone's silence but on what he said. Further, defense counsel interposed no objection at trial and, therefore, there is no fundamental constitutional error. Clark v. State, 363 So.2d 331 (Fla.1978).

Evidence of Unrelated Criminal Activity

[13] Antone maintains that we must reverse because the trial court failed to grant a mistrial following Haskew's testimony implicating Antone in other criminal activity. Haskew's testimony related that Antone wanted him to kill five men, three named and two unnamed. Our view of the record establishes that the challenged testimony relating to other criminal activity occurred as part of the primary arrangements for this contract murder and was therefore relevant to show the existence of this conspiracy. See Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Improper Limitation in Presenting Impeachment Testimony

[14] [15] Antone asserts that the trial court erroneously limited the direct examination by defense counsel of a character witness whose testimony impeached Haskew's reputation for truth and veracity. Mr. Tommy Walker, former mayor of the City of Bartow, testified:

> Q Mr. Walker, do you know the general reputation of Ellis Marlow Haskew for truth and veracity in the community of Bartow?
>
> A I would think I do, yes.
>
> Q Have you ever discussed his reputation with others in the community?
>
> MR. BOWDEN: Your Honor, I object to the form of the question.
>
> THE COURT: You may rephrase that.
>
> Q (By Mr. Ferlita) Have you ever heard his reputation discussed by other people?
>
> A Yes, sir, often.
>
> Q What is that reputation of Ellis Marlow Haskew for truth and veracity within the community of Bartow?
>
> MR. BOWDEN: Objection to the form of the question, Your Honor.
>
> THE COURT: Overruled.
>
> THE WITNESS: Answer?
>
> THE COURT: Yes, you may answer.
>
> THE WITNESS: I would say it's not good.

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Q (By Mr. Ferlita) Based on the general reputation of Marlow Haskew for truth and veracity, would you believe him under oath?

MR. BOWDEN: Objection, Your Honor. That is an improper question of the witness.

THE COURT: Sustained.

This record clearly reflects that the witness was properly allowed to tell the jury that Haskew's reputation for truth and veracity *1214 in the community was not good. A further question objected to by the prosecution and sustained by the trial court sought to elicit the individual and personal view of the witness. We agree with the trial court. The clear weight of authority allows only the general reputation of the witness in the community to be admissible.[4] See generally C. McCormick, Evidence s 44 (2d ed. 1972).

[16] Antone cites two early cases which in dicta suggest that the excluded question would be permissible. Nelson v. State, 32 Fla. 244, 13 So. 61 (1893); Robinson v. State, 16 Fla. 835 (1878). To the extent that these cases allow this type of opinion evidence to impeach a witness, we overrule them. We also find Antone was not prejudiced by the exclusion of the disputed question. Haskew's reputation was properly placed before the jury by the previous question and answer.

Failure to Disclose Confidential Informant

[17] Antone asserts that we must reverse because the trial court denied his motion to compel disclosure of a confidential informant. The case relied on by Antone, Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), does not mandate disclosure of every confidential informant. Rather, a careful balancing of interests is necessary. The record reflects that this confidential informant was not present at any material point in this incident and did not testify. We find Antone has not sustained his burden of showing prejudice by this nondisclosure. See Hawkins v. State, 312 So.2d 229 (Fla. 1st DCA 1975).

Failure to Dismiss Indictment and Constitutionality of the Death Penalty Statute

[18] [19] [20] Antone contends that the grand jury which indicted him was improperly selected. More than mere conclusory statements, however, are necessary to sustain such a challenge. See ss 905.02-.06, Fla.Stat. (1977). He also contends that the right to confront his accusers, the right to counsel, and other constitutional rights were violated by the instant grand jury proceedings. The protections afforded by the Bill of Rights, however, do not attach in full to grant jury proceedings which are inquisitorial rather than adversary in nature. See, e. g., United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976); United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957).

[21] Antone finally urges, without elaboration, that the first-degree murder statute and the death penalty statute are unconstitutional. These issues have been previously rejected, and the law is now settled. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

B. New Trial Upon Newly Discovered Evidence

Antone contends that he is entitled to a new trial because of the discovery subsequent to trial that the FDCLE had paid an attorney $11,500 to represent Haskew. Antone argues that the failure to disclose this information prior to trial violates both Florida Rule of Criminal Procedure 3.220 and the dictates of Brady v. Maryland and United States v. Agurs. We remanded this cause to the trial court, Antone v. State, 355 So.2d 777 (Fla.1978), for an evidentiary hearing to determine if a new trial should be granted. The trial court denied a new trial, and we agree.

[22] [23] The resolution of this issue is controlled by the guidelines established in *1215 Agurs. There the majority opinion outlined three situations in which a Brady violation might occur. The first situation occurs when undisclosed evidence demonstrates that the prosecution's case included perjured testimony. If the prosecution knew or should have known of the perjury and there is a reasonable likelihood that the false testimony could have altered the jury's judgment, then fundamental fairness mandates that a new trial be granted. Antone contends that Haskew's testimony concerning the plea bargain arrangement was false, that the prosecution should have known it was false, and that it could have affected the judgment of the jury. We cannot agree. As

the trial court reasoned in its detailed order, questions asked of Haskew both in deposition and at trial were directed solely to the plea bargain agreement. Taken in context, Haskew's answers can fairly be characterized as truthful.

[24] [25] The second situation occurs when a pretrial request for specific evidence is made. If the requested evidence is withheld by the prosecution following a specific request and the evidence is material meaning that it might have affected the outcome of the trial then a new trial must be ordered. The Agurs court succinctly stated: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106, 96 S.Ct. at 2398. In the instant case defense counsel made only general demands for "material or information within the State's possession or control which tends to negate the guilt of the Defendant . . . ." Antone's attorneys also filed a motion seeking disclosure of all evidence favorable to the defendant. We therefore find this second situation not applicable because no specific request was ever made.

[26] The third situation occurs when a general request for Brady information has been made and a failure to disclose has followed. In this situation, the standard of "materiality" which Agurs states must be applied is as follows:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-13, 96 S.Ct. at 2402 (footnotes omitted). Applying this test to the undisclosed evidence of FDCLE's payment of Haskew's attorney's fees, we find that Antone's conviction must stand. The evidence in no way detracts from the testimony presented by the state which established Antone's guilt beyond and to the exclusion of every reasonable doubt. At best, the evidence was useful for impeachment of Haskew, but it is not germane to Antone's guilt or innocence. Further, and even more significant, evidence tending to impeach Haskew was already before the jury, and this evidence would have added little to defense efforts to show Haskew as a witness unworthy of the jury's belief. In addition, Haskew would have been entitled to counsel in any event, and there is no showing of any conspiracy between his counsel and the state. Upon our remand, the trial court found no evidence of deliberate prosecutorial misconduct. We agree. We find the undisclosed evidence clearly fails to meet the Agurs test of materiality, and a new trial is therefore not required. [5]

***1216 C. The Sentencing Phase**

[27] [28] [29] [30] It is our duty to examine the record in this cause and determine whether there are clear and convincing facts which warrant the imposition of the death penalty. In accepting the jury recommendation and imposing the death penalty, the trial judge found four statutory aggravating factors: (1) Antone had been convicted of two felonies involving the threat of violence to a person, specifically two armed robberies, which we find is appropriately an aggravating circumstance under section 921.141(5)(b); (2) the murder had been committed for pecuniary gain in that Antone received at least $750 for his share of this contract killing, and we find this is an appropriate aggravating circumstance under section 921.141(5)(f); (3) the murder was committed to disrupt and hinder the enforcement of laws in that it prevented the victim from testifying before a grand jury, and we find this is an appropriate aggravating circumstance under section 921.141(5)(g); and (4) this murder was especially heinous, atrocious, and cruel in the manner in which it was carried out. Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance. See, e. g., Cooper v. State, 336 So.2d 1133 (Fla.1976).

[31] The trial court found no mitigating circumstances, and we agree that the record supports this finding. The appellant

asserts that he was only an accomplice in a capital felony committed by another person and that his participation was relatively minor. This contention is without merit. The facts in this case are clearly distinguishable from the facts and circumstances in Slater v. State, 316 So.2d 539 (Fla.1975). Antone was the mastermind of this operation. He supplied the gun, paid the money from his pocket, and pressured Haskew to complete the task. His participation cannot under any view of this record, be termed minor. Without Antone's participation, the murder would not have come to fruition.

[32] [33] Because we fully approve the first three aggravating circumstances and find no mitigating circumstances, it is not necessary to consider the appropriateness of the trial court's finding that the murder was heinous, atrocious, or cruel. An error in finding this aggravating circumstance does not invalidate the imposition of the death sentence. Eiledge v. State, 346 So.2d 998 (Fla.1977); Alford v. State, 307 So.2d 433 (Fla.1975). The three approved aggravating circumstances are clearly sustained by the record in this case, and there are no appropriate mitigating factors that should be taken into consideration.

For the reasons expressed, we affirm the conviction of Anthony Antone for the murder of Richard Cloud and agree that the death penalty is clearly an appropriate punishment in this cause.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and SUNDBERG, JJ., concur.

Footnotes

1 Art. V, s 3(b)(1), Fla.Const.

2 Florida courts have also been called upon to apply the Aguilar-Spinelli test. See, e. g., Findlay v. State, 316 So.2d 33 (Fla.1975); State v. Smith, 233 So.2d 396 (Fla.1970); St. John v. State, 356 So.2d 32 (Fla. 1st DCA 1978); Davis v. State, 350 So.2d 834 (Fla.2d DCA 1977), cert. denied, 355 So.2d 517 (Fla.1978).

3 Wilson and Henry are distinguishable from our decision in Greene v. State, 351 So.2d 941 (Fla.1977). In Greene we did not address the applicability of McDole, but, instead, we discussed the issue of remand when voluntariness is not clear.

4 Our holding in this matter is consistent with the new Florida Evidence Code, effective July 1, 1979. s 90.609, Fla.Stat. (Supp.1978).

5 In a federal prosecution arising from the murder of Cloud, the Fifth Circuit held that Haskew's false testimony concerning payment of attorney's fees did not require a new trial, because revelation of the fact that such fees were paid by the state would not reasonably have affected the judgment of the jury. See United States v. Antone, 603 F.2d 566 (5th Cir. 1979).

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868 So.2d 643
District Court of Appeal of Florida,
Second District.

Robert Earl **BROOKS**, Appellant,
v.
STATE of Florida, Appellee.

No. 2D03–833. | March 17, 2004.

Synopsis

Background: Defendant was convicted in the Circuit Court, Lee County, R. Thomas Corbin, J., of aggravated battery with a deadly weapon arising out of domestic violence incident. Defendant appealed.

Holding: The District Court of Appeal, Wallace, J., held that witness's nonresponsive statement that defendant had been "sent back to prison," erroneously implying that defendant had been sent to prison in connection with earlier domestic violence incident, was prejudicial error.

Reversed and remanded.

West Headnotes (3)

[1] **Criminal Law**
- Assault and battery

Criminal Law
- Controverting defense evidence or theory

Criminal Law
- Witnesses

In prosecution for aggravated assault arising out of domestic violence incident, defendant's former wife's nonresponsive answer to prosecutor's question, stating that defendant had been "sent back to prison," erroneously implying that defendant had been sent to prison in connection with earlier domestic violence incident, was prejudicial error; cautionary instruction that nonresponsive statement was "beyond this witness's knowledge" could not ameliorate statement's prejudicial effect, evidence of prior criminal behavior cast doubt on defendant's claim of self-defense, and denial of motion for mistrial necessitated substantial shift in defense strategy, including exposing defendant to impeachment concerning his two prior felony convictions.

4 Cases that cite this headnote

[2] **Criminal Law**
- Showing bad character or criminal propensity in general

Evidence of any crime committed by a defendant, other than the crime for which the defendant is on trial, is inadmissible in a criminal case when its sole relevance is to attack the character of the defendant.

Cases that cite this headnote

[3] **Criminal Law**
- Grounds in general

Criminal Law
- Issues related to jury trial

Reviewed for abuse of discretion, a motion for mistrial should be granted only when the error is so prejudicial as to vitiate the entire trial.

3 Cases that cite this headnote

Attorneys and Law Firms

***643** James Marion Moorman, Public Defender, and Clark E. Green, Assistant Public Defender, Bartow, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and John M. Klawikofsky, Assistant Attorney General, Tampa, for Appellee.

Opinion

WALLACE, Judge.

Robert Earl Brooks appeals his conviction for aggravated battery with a deadly weapon. He contends that the trial court should have granted his motion for mistrial after the alleged victim, his former wife, testified that Brooks was "sent back to prison" following a prior incident of domestic violence

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during which she shot Brooks twice. We agree with Brooks that this error was not harmless and that the trial court abused its discretion in denying the motion for mistrial. Therefore, we reverse Brooks' judgment and sentence, and we remand for a new trial.

The State charged Brooks with two counts of aggravated battery with a deadly weapon, to wit, a knife. The alleged victims were Rosa Brookins, Brooks' former wife, and Aquawana Brooks, their sixteen-year-old daughter. The incident occurred at Rosa's home where Brooks occasionally resided. Rosa testified that after she and *644 Brooks had a disagreement, he took a steak knife from a kitchen drawer and stabbed her three times. Aquawana, who had been in another room when the incident began, came to her mother's aid and stabbed Brooks with a steak fork. In a statement he made to police after the incident, Brooks contended that Rosa was the aggressor and that he had acted in self-defense. Brooks said that after Rosa initiated an attack on him with the knife, he struggled with her for possession of it. In the ensuing melee, Rosa and Aquawana were both cut. Brooks said that he also sustained a cut to his finger in the course of trying to wrest the knife from Rosa.

Brooks' counsel cross-examined Rosa at length about a prior incident of domestic violence in which Rosa had shot Brooks twice. Defense counsel suggested that on the prior occasion, Rosa "got away with it." On redirect, the prosecutor elicited a lengthy explanation of the prior incident from Rosa and why she believed she had shot Brooks in self-defense. During the prosecutor's redirect examination of Rosa, the following exchange occurred:

> Q. Did the police investigate this?
>
> A. Yes. I was never arrested, never had a mug shot taken, never fingerprinted. I had to give a statement, and the police brought me back home.
>
> Q. Okay. Did the defendant get charged in that case?
>
> A. A few months later, he was sent back to prison.

Brooks' counsel promptly objected and moved for a mistrial on account of Rosa's nonresponsive answer about Brooks' prior criminal history. Brooks' counsel also explained to the trial court that the reason Brooks went back to prison was unrelated to the shooting incident. The prosecutor did not dispute defense counsel's assertion that the reason for Brooks' return to prison was unrelated to the prior incident of domestic violence. Instead, the prosecutor suggested that a curative instruction was sufficient to cause the jury to disregard Rosa's statement.

The trial court initially reserved ruling on the motion for mistrial but did give the jury a cautionary instruction directing them to ignore Rosa's nonresponsive answer. Brooks' counsel renewed her motion for mistrial later in the trial, and the trial court ultimately denied it.

Brooks testified at trial in support of the defense theory that Rosa was the aggressor in the incident and that he had acted only in self-defense. He was able to explain to the jury that he was not charged with any crime as a result of the prior incident of domestic violence with Rosa. Nevertheless, Brooks admitted that he had two prior felony convictions.

The jury acquitted Brooks of committing an aggravated battery on Aquawana but found him guilty as charged of committing an aggravated battery on Rosa. Brooks filed a motion for new trial that the trial court denied. The trial court sentenced Brooks to fifteen years in prison as a prison releasee reoffender.

[1] [2] Rosa's nonresponsive answer to the prosecutor's question implied that Brooks had been sent to prison twice—once in connection with a prior incident of domestic violence in which she had shot him twice and had not been arrested. This testimony was improper and unfairly prejudicial to Brooks. "Evidence of any crime committed by a defendant, other than the crime for which the defendant is on trial, is inadmissible in a criminal case when its sole relevance is to attack the character of the defendant." *Cornatzer v. State*, 736 So.2d 1217, 1218 (Fla. 5th DCA 1999); *see also Dawkins v. State*, 605 So.2d 1329, 1330 (Fla. 2d DCA 1992); *645 *Garvey v. State*, 754 So.2d 130 (Fla. 3d DCA 2000); *J.P. v. State*, 545 So.2d 753 (Fla. 3d DCA 1989); *Finkley v. State*, 471 So.2d 596, 597 (Fla. 1st DCA 1985). Thus the question presented to us is whether Rosa's nonresponsive remark—considered in the light of the trial court's cautionary instruction to the jury—can be deemed harmless error.

[3] Reviewed for abuse of discretion, a motion for mistrial should be granted only when the error is so prejudicial as to vitiate the entire trial. *Overton v. State*, 801 So.2d 877, 897 (Fla.2001). In *Henderson v. State*, 789 So.2d 1015, 1018 (Fla. 2d DCA 2000), we said: "The improper admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court. When

any curative instruction would be insufficient, the trial court should grant a mistrial." (Citation omitted.) *See also Finkley*, 471 So.2d at 597; *Vazquez v. State*, 405 So.2d 177, 179 (Fla. 3d DCA 1981), *approved in part, quashed in part*, 419 So.2d 1088 (Fla.1982).

In this case, after defense counsel objected and moved for a mistrial, the trial court gave the following curative instruction to the jury: "Members of the jury, that last statement from the witness was nonresponsive to any question, also beyond this witness's knowledge[;] therefore, that answer is stricken from the record. You must ignore it." After a thorough review of the record, we conclude that the State has not met its burden of showing beyond a reasonable doubt that Rosa's statement concerning Brooks' prior criminal history did not contribute to the jury's verdict of guilt. *See State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). Three reasons support our conclusion.

First, under the circumstances of this case, we think the curative instruction was likely to be ineffective. The declaration that Rosa's nonresponsive statement was "beyond this witness's knowledge" could not ameliorate the statement's prejudicial effect. Whether Brooks went to prison following the prior incident of domestic violence was a fact concerning which the jury could reasonably assume that Rosa had personal knowledge. Rosa made a statement of fact; she had not offered speculation about a matter unknown to her. In view of the violent nature of both incidents of domestic violence and Brooks' defense of self-defense to the aggravated battery charge arising from the more recent of the two events, the jury had reason to believe that evidence of Brooks' prior criminal behavior was reliable and relevant to the crime charged. Thus improper evidence of Brooks' prior criminal behavior could not be cured by a cautionary instruction to the jury. *See Henderson*, 789 So.2d at 1018--19.

Second, evidence of Brooks' prior criminal behavior (incorrectly linked to the prior incident of domestic violence) inevitably cast doubt upon Brooks' theory of self-defense. Rosa and Brooks presented opposing and uncorroborated accounts concerning who was the aggressor in the stabbing incident. Brooks gave the police a taped interview in which he said that Rosa attacked him with the steak knife and that she was stabbed while he was defending himself. In *Dawkins*, 605 So.2d 1329, the defendant, who was charged with attempted first-degree murder, explained that he shot the victim in self-defense. During cross-examination of the defendant and in closing argument, the prosecutor improperly suggested that the defendant committed the crime of unlawful possession of a firearm by a convicted felon, a collateral uncharged crime. The trial court denied defense counsel's motions for mistrial. We said that merely asking the question about the uncharged crime placed the defendant's ***646** character in issue "which was especially prejudicial because of his self-defense argument." *Id.* at 1330. Because the facts on the issue of self-defense were disputed and the jury would be less likely to believe the defendant was defending himself if the jury knew he had committed other unlawful acts, we held that the error could not be deemed harmless. *Id.* Similarly, the error in this case cannot be deemed harmless because the jurors would be less likely to believe that Brooks was defending himself if they believed that he had committed acts in a prior incident of domestic violence that had caused him to be sent back to prison.

Finally, Rosa's nonresponsive statement cannot be considered harmless because it appears to have had a substantial negative impact on the defense trial strategy. During opening statements, the prosecutor announced that the State would play Brooks' tape-recorded police interview for the jury. In that interview, Brooks had given his version of the facts supporting a theory of self-defense. Defense counsel's opening statement indicates an intention to rely on the tape-recorded statement in support of the self-defense theory—not in-court testimony from Brooks. By relying on both the tape-recorded interview and cross-examination of Rosa about her prior shooting of Brooks, defense counsel could have presented a colorable case for self-defense without having Brooks testify. This strategy would have avoided exposing Brooks to impeachment concerning his two prior felony convictions.

The denial of the motion for mistrial necessitated a substantial shift in the defense strategy. Defense counsel would arguably have been remiss in the discharge of her professional responsibility if she had not put Brooks on the stand to refute the unmistakable—but inaccurate—implication in Rosa's statement that Brooks "was sent back to prison" because of his criminal behavior in connection with the prior incident of domestic violence. Nevertheless, having Brooks testify exposed him to impeachment concerning his two prior felony convictions. Absent Rosa's nonresponsive statement, Brooks would likely have chosen not to testify in his own behalf. Under the circumstances of this case, the negative impact of the evidence concerning Brooks' prior criminal behavior on the defense trial strategy militates against a finding of harmless error.

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For these reasons, the trial court erred in failing to grant the motion for mistrial. The judgment and sentence imposed upon Brooks must be reversed and the case remanded for a new trial.

Reversed and remanded for a new trial.

CASANUEVA and CANADY, JJ., concur.

Parallel Citations

29 Fla. L. Weekly D684

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TRAFFIC CITATIONS

OBJECTION:

Your honor, I object. Evidence of traffic citations is not admissible.

Comment

Evidence that a traffic citation was or was not given by a police officer is not admissible to show fault or the absence of fault.

- Hernandez v. State Farm Fire & Cas. Co., 700 So.2d 451 (Fla. 4th DCA 1997) (Evidence of officer's conclusion that driver failed to yield the right of way, as well as whether traffic citation was issued, was inadmissible.).
- Spanagel v. Love, 585 So.2d 317 (Fla. 5th DCA 1991) (Reversible error to admit testimony of officer called to scene of accident, that there had been no improper driving on the part of the defendant.).
- Fla. Stat. § 316.650(9) ("Such [traffic] citations shall not be admissible evidence in any trial.").
- Ehrhardt, Florida Evidence § 403.1.

UNRESPONSIVE ANSWER

OBJECTION:

Your honor, I object and move to strike. The answer is unresponsive.

Counsel examining the witness is entitled to responsive answers to the questions asked the witness. If the witness answers in a nonresponsive manner, counsel is entitled to have the answer stricken simply because it is unresponsive.

Comment

If opposing counsel seeks to have an answer stricken because it is unresponsive, opposing counsel must also specify a rule of exclusion that could have been interjected before the witness answered.

- C. McCormick, Evidence § 52 (6th ed. 2005).
- Ehrhardt, Florida Evidence § 104.2.

West's Florida Statutes Annotated
West's Florida Local Rules and Administrative Orders
Twentieth Judicial Circuit (Charlotte, Collier, Glades, Hendry and Lee Counties)
Administrative Orders
Judicial Administration

Twentieth Judicial Circuit 2.13

2.13. STANDARDS OF COURTROOM DECORUM

Currentness

IN THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR THE STATE OF FLORIDA

ADMINISTRATIVE ORDER NO: 2.13

IN RE: STANDARDS OF COURTROOM DECORUM

WHEREAS the Judges of the Circuit and County Courts of the Twentieth Judicial Circuit have agreed that certain basic principles of courtroom decorum and behavior should be formally stated for the benefit and guidance of those unfamiliar with local traditions, the following standards of decorum are hereby adopted:

AS TO COUNSEL

When appearing in any court of the Twentieth Judicial Circuit, unless excused by the presiding judge, all counsel shall abide by the following:

(1) Stand as Court is opened, recessed or adjourned.

(2) Stand when the jury enters or retires from the courtroom.

(3) Stand when addressing, or being addressed by, the Court.

(4) Stand at the lectern while examining any witness; except that counsel may approach the Clerk's desk or the witness for purposes of handling or tendering exhibits.

(5) Stand at the lectern while making opening statements or closing arguments.

(6) Address all remarks to the Court, not to opposing counsel.

(7) Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill-feeling between the litigants or witnesses.

(8) Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names.

(9) Only one attorney for each party shall examine or cross examine each witness. The attorney stating objections (if any) during direct examination shall be the attorney recognized for cross examination.

(10) Request permission before approaching the bench.

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(11) Any paper or exhibit not previously marked for identification should first be submitted to the Clerk for marking before it is tendered to a witness; and any exhibit offered into evidence should, at the time of such offer, be handed to opposing counsel.

(12) In making objections, counsel should briefly state only the legal grounds therefore without further elaboration unless such is requested by the Court.

(13) In examining a witness, counsel shall not repeat or echo the answer given by the witness.

(14) Offers or requests for stipulations shall be made out of the presence or hearing of the jury.

(15) In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.

(16) Counsel shall instruct all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

(17) All counsel shall dress in an appropriate manner consistent with the requirements of decorum and dignity appropriate to courtroom proceedings.

The standards set forth above are minimal, not all-inclusive, and are intended to supplement, not supplant or limit, the ethical obligations of counsel under the Rules of Professional Conduct. Individual judges may announce and enforce additional requirements or prohibitions, or may excuse compliance with any one or more of these standards.

AS TO NON-LAWYERS

(1) All persons appearing before the Court shall endeavor to dress in a reasonably conservative manner consistent with the requirements of decorum and dignity appropriate to courtroom proceedings. Generally, shorts, tank-tops and other beach attire are not appropriate as courtroom attire.

(2) All persons attending court proceedings shall refrain from making gestures, facial expressions, audible comments, applause, or the like, as manifestations of approval or disapproval during the testimony of a witness or during the oral presentation of counsel, or at any other time.

(3) In presentations before the Court, unrepresented parties shall observe the same rules of decorum which apply to attorneys.

WHEREFORE these standards are hereby adopted by the judges of the Circuit and County Courts of Lee County, Florida, this 9th day of November, 1992.

.....

Thomas S. Reese
Chief Circuit Judge
History. - New.

Twentieth Judicial Circuit 2.13, FL ST 20 J CIR 2.13
Current with amendments received through 11/1/14

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832 So.2d 959
District Court of Appeal of Florida,
Second District.

Jermaine Carlos JOHNS, Appellant,
v.
STATE of Florida, Appellee.

No. 2D01-4436. | Dec. 27, 2002.

Defendant was convicted in the Circuit Court, Pasco County, William R. Webb, J., of attempted robbery without a weapon while wearing a mask. Defendant appealed. The District Court of Appeal, Green, Oliver L., Senior Judge, held that: (1) prosecutor's statements during closing argument were improper; and (2) error was not harmless.

Reversed and remanded.

West Headnotes (9)

[1] **Criminal Law**
⇐ Comments Regarding Character of Victim

Prosecutor's statement during closing argument that he was not asking jury to convict defendant because members felt sorry for the victim was improper request that jury show sympathy for victim at trial for attempted robbery.

4 Cases that cite this headnote

[2] **Criminal Law**
⇐ Matters Not Sustained by Evidence

Prosecutor's statement during closing argument that state had charged the right defendant and had only brought charges it could prove improperly implied that state only charged those who were guilty, at trial for attempted robbery.

2 Cases that cite this headnote

[3] **Criminal Law**
⇐ Matters Not Sustained by Evidence

An argument that the State only charges those who are guilty is improper.

2 Cases that cite this headnote

[4] **Criminal Law**
⇐ Character, Conduct, or Appearance of Accused

Statement made by prosecutor during closing argument that robbery of restaurant employee was not successful because restaurant knew that "people like the defendant" were out trying to rob employees improperly cited defendant as a certain criminal type at trial for attempted robbery.

Cases that cite this headnote

[5] **Criminal Law**
⇐ Credibility and Character of Witnesses; Bolstering

Criminal Law
⇐ Character, Conduct, or Appearance of Accused

It is improper to cite witnesses or defendants as examples of a certain criminal type.

Cases that cite this headnote

[6] **Criminal Law**
⇐ Statements as to Facts, Comments, and Arguments

Criminal Law
⇐ Appeals to Sympathy or Prejudice; Argument as to Punishment

Improper statements made by prosecutor in closing argument that requested jury's sympathy, implied that state only charged those who were guilty, and cited defendant as an example of a certain criminal type, were not harmless error at trial for attempted robbery; though court gave curative instructions after each statement was made, trial was not "neutral arena" as result of cumulative effect of statements and relative lack of evidence against defendant.

2 Cases that cite this headnote

[7] **Criminal Law**

Credibility of Other Witnesses

Criminal Law

Character, Conduct, or Appearance of Accused

Criminal Law

Attacks on Opposing Counsel

Prosecutor's statements during closing argument in robbery prosecution disparaging defendant for exercising his right to trial, vouching for credibility of law enforcement officers who testified, and denigrating both defendant's defense and defense counsel, were improper.

1 Cases that cite this headnote

[8] Criminal Law

Scope of and Effect of Summing Up

A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.

Cases that cite this headnote

[9] Criminal Law

Arguments and Conduct of Counsel

Appellate court must look at the entire trial record when considering whether prosecutor's comments at issue are of such a nature as to destroy the fairness of the proceeding.

1 Cases that cite this headnote

Attorneys and Law Firms

***960** James Marion Moorman, Public Defender, and Ronald S. Tulin, Special Assistant Public Defender, Bartow, for Appellant.

Richard E. Doran, Attorney General, Tallahassee, and Sonya Roebuck Herbelt, Assistant Attorney General, Tampa, for Appellee.

Opinion

GREEN, OLIVER L., Senior Judge.

Jermaine Carlos Johns challenges his conviction and sentence for attempted robbery while wearing a mask. Johns raises four issues on appeal, only one of which has merit. Because we agree that improper comments made in the State's closing argument denied Johns a fair trial, we reverse.

The evidence at trial established that two men attempted to rob a Burger King manager as he was leaving the restaurant after closing. One of the men was wearing a mask, and the other remained too far away for the victim to see clearly. The man in the mask demanded the "pouch" from the victim, presumably in reference to a restaurant bank bag. When the victim responded that he did not have the pouch, the robbers quickly walked away.

At the same time, a sheriff's department helicopter happened to be overhead, and a Pasco County sheriff's detective in the helicopter observed the attempted robbery by means of a forward-looking infrared (FLIR) camera. This type of camera allowed the detective to see the victim and the robbers as glowing forms, but he could not identify any features of any of the individuals. The detective tracked the robbers with the FLIR camera as they made their escape, and he directed other sheriff's officers to form a perimeter on the ground. While officers on the ground were setting up a perimeter, the detective using the FLIR camera lost track of both robbers under the trees.

As Pasco Sheriff's Deputy Collazo was driving to his designated location in the perimeter, a man ran across the road, almost running into the patrol car. Collazo immediately began a foot pursuit of this man, believing him to be one of the robbers. As Collazo was chasing this suspect, he found Johns standing behind a tree, sweating and out of breath and looking up at the helicopter. Collazo stopped chasing the running suspect and arrested Johns. In Johns' back pocket, Collazo found a black "doo rag." Collazo took Johns back to Burger King where the victim was giving a statement. While the victim could not identify Johns as one of his assailants, he did identify Johns' "doo rag" as the mask the robber was wearing.

Following the victim's identification of Johns' "doo rag" as the mask worn by the robber, the police read Johns his *Miranda*[1] rights. Johns then gave the police various

conflicting statements concerning how he got to the area, his reasons for being in the area, and his reasons for hiding behind the tree. Johns was subsequently charged with attempted armed robbery while wearing a mask.

At trial, the State argued that Johns was found in the area of the crime with a "doo rag" identified by the victim as the mask worn during the attempted robbery. The State argued that Johns' conflicting statements to police showed that he was not telling the truth about why he was in the area or what he had been doing. Johns' theory of defense was that he was caught in the wrong place at the wrong time. He argued that he had been in the area to visit his girlfriend, that he had left her apartment to find a pay phone, and that when he spotted the helicopter, he realized that there was trouble in the area. He decided to hide behind the tree out of ***961** the way until the police activity died down and he could go about his business.

During closing arguments, the prosecutor began with the following comment:

> [PROSECUTOR]: You folks, I'd ask that you not forget the victim as you sit in this courtroom and you see the defendant's mother, and younger brother.
>
> As we talked in jury selection about sympathy, and I understand that sympathy is a normal very natural human response, I ask that you not forget the victim.
>
> [DEFENSE COUNSEL]: Objection. May we approach for a legal motion?
>
> BENCH CONFERENCE:
>
> [DEFENSE COUNSEL]: Motion for mistrial on the grounds he's bringing sympathy as an issue before the jury.
>
> THE COURT: Okay. The motion for mistrial is denied. But I don't want either side to be arguing sympathy, and say remember the victim, it comes too close to that. So I'm not going to allow you to continue in this vain [sic].

The jury was instructed to disregard the prosecutor's comments. Despite this admonition, the prosecutor continued:

> Folks, I'm not going to ask you to convict the defendant because you feel sorry for the victim, that's not what I'm asking you to do. I'm not asking you to acquit the defendant because you feel sorry for his family.

Later, the prosecutor made the following argument concerning whether Johns was properly charged:

> Did we charge someone who's 6#2# or 6#4,# with this crime? No. Did we charge someone who didn't have the implements necessary to pull this crime off? No.
>
> Did we charge someone who the victim described as having a speech pattern consistent with an African American citizen with our country? No. Because the defendant's voice has a distinct pattern, which you all heard. Did we charge somebody, folks, that wasn't in the area? No.
>
> Did we charge somebody who wasn't running? No. Did we charge someone who didn't have the means of escape in a vehicle? No. Did we charge someone who didn't have the keys to the means of escape? No. And did we charge someone who was honest with law enforcement? No.
>
> We charged someone who had every opportunity and completely made every effort from day one to impede these officers' investigation over and over again, as evidenced by those tapes.

A short time later, the prosecutor continued with this argument:

> Number two, the defendant is guilty of the lesser included offense of attempted robbery without a weapon.
>
> Now, why does that not apply to these facts? Simple. Again your common sense will tell you it doesn't apply, because the victim in this case told you that he felt a blunt object in his ribs, and he looked down and saw the defendant's hand or a robber's hand around some object and he thought it was a gun.
>
> He felt it was a gun, but *did we charge the defendant with a gun? No. Because we couldn't prove it. We didn't charge anything that we couldn't prove.* What we charged was provable.

(Emphasis added.)

Next, the prosecutor argued that "people like the defendant" committed crimes:

> And unfortunately for the defendant the victim didn't have any money,

> because Burger King knows enough to know that the defendant, *people like the defendant are out at night robbing people,* especially managers of stores, so they don't let their managers go out with cash at night.

***962** (Emphasis added.) The court, sua sponte, interrupted the prosecutor at that point and admonished him that this argument was improper. In closing, the prosecutor argued, "What in the world entitles him the defendant to a verdict of not guilty? What in the world, mere possibility?"

In addition to these specific comments, throughout his argument the prosecutor continually denigrated Johns' theory of defense and belittled defense counsel for maintaining such a defense. The prosecutor also commented on facts not in evidence and improperly vouched for the credibility of the law enforcement officers who testified.

After deliberations, the jury found Johns guilty of the lesser offense of attempted robbery without a weapon while wearing a mask. Johns then brought this appeal, arguing, among other things, that the prosecutor's improper closing arguments denied him his right to a fair trial.

We begin by noting that while there was sufficient evidence to withstand a motion for judgment of acquittal, the evidence against Johns was not overwhelming. Johns was arrested within the perimeter set up by the police after the attempted robbery but more than seven-tenths of a mile from the Burger King where the attempted robbery occurred. Johns was not fleeing from the police when he was apprehended but was found hiding behind a tree. Deputy Collazo, who had been chasing a known suspect, gave up that chase after spotting Johns and arrested Johns instead. Johns did not resist Collazo or try to flee. Johns told Collazo that he had been at his girlfriend's house and that he had left there to find a pay phone. The only physical evidence connecting Johns in any way to the crime was the "doo rag." Based on this evidence, the case should properly have gone to the jury. However, contrary to the State's assertions, the evidence was not overwhelming.

[1] [2] [3] [4] [5] [6] [7] In the context of this evidence, the prosecutor's improper arguments to the jury rose to the level of reversible error. The prosecutor's first statement was a request that the jury show sympathy for the victim. This type of argument is clearly improper. *See Thomas v. State,* 787 So.2d 27, 30 (Fla. 2d DCA 2001); *Brown v. State,* 593 So.2d 1210, 1211-12 (Fla. 2d DCA 1992). The prosecutor also argued that the State had charged the right person and had only brought charges that it could prove, implying the State only charges those who are guilty. An argument that the State only charges those who are guilty is improper. *Ruiz v. State,* 743 So.2d 1, 5 (Fla.1999). The prosecutor next argued that the reason that the robbery was not successful was because Burger King knew that "people like the defendant" were out there trying to rob employees. However, it is improper to cite witnesses or defendants as examples of a certain criminal type. *Perez v. State,* 689 So.2d 305, 307 (Fla. 3d DCA 1997). The State then went on to disparage Johns for having exercised his right to trial. This too is an improper argument. *See Bell v. State,* 723 So.2d 896 (Fla. 2d DCA 1998). Next, the State vouched for the credibility of the law enforcement officers who testified. This again is an improper argument. *Brown v. State,* 787 So.2d 229, 230 (Fla. 2d DCA 2001). Finally, the State's arguments that denigrated both Johns' defense and defense counsel were improper. *Miller v. State,* 712 So.2d 451, 453 (Fla. 2d DCA 1998); *Lewis v. State,* 711 So.2d 205, 206 (Fla. 3d DCA 1998). The trial court acknowledged the impropriety of these arguments, sustained the objections made, and instructed the jury to disregard the comments; however, the trial court denied Johns' motions for mistrial.

***963** [8] [9] In making these improper arguments, the prosecutor failed to maintain the demeanor required in a criminal trial. "A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence[.]" *Ruiz,* 743 So.2d at 4. While no one of the comments standing in isolation would have required a new trial, this court must look at the entire trial record when considering whether the comments at issue are of such a nature as to destroy the fairness of the proceeding. *Brown,* 787 So.2d at 230. When considering the relative lack of evidence against Johns, the character of the evidence that did exist, and the number of improper arguments made by the prosecutor, it is apparent that the prosecutor's closing argument was improper with respect to the "neutral arena" in which a trial should be held, *Ruiz,* 743 So.2d at 4, and that the curative instructions were insufficient. The cumulative effect of these improper arguments was not harmless. *See State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986) (holding that to establish harmless error, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict or,

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alternatively stated, that there is no reasonable possibility that the error contributed to the conviction"). Accordingly, we reverse and remand for a new trial.

Reversed and remanded.

SILBERMAN and KELLY, JJ., concur.

Parallel Citations

28 Fla. L. Weekly D149

Footnotes

1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

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994 So.2d 1000
Supreme Court of Florida.

Dana WILLIAMSON, Appellant,
v.
STATE of Florida, Appellee.
Dana Williamson, Petitioner,
v.
Walter A. McNeil, etc., Respondent.

Nos. SC07-564, SC07-1787. | Oct. 8, 2008.

Synopsis

Background: After affirmance of his murder conviction and death sentence, 681 So.2d 688, defendant brought motion to vacate his conviction and sentence. The Circuit Court, Broward County, Richard D. Eade, J., summarily denied the motion. Defendant appealed and petitioned for writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] prosecutor did not make an improper golden-rule argument;

[2] *Frye* hearing should have been held, before admission of testimony, from State's witness, that co-defendant, who was indicted by grand jury but who testified at defendant's trial as State's key witness after the charges against co-defendant were dismissed, had displayed, with respect to the criminal episode, "a pattern of someone" who "ha[d] been terrorized, and someone who [had been] acting in response to a credible threat";

[3] prosecutor did not improperly vouch for the credibility of a witness; and

[4] error was harmless beyond a reasonable doubt, as to allowing jury to consider the non-existent crime of attempted felony murder, as prior violent felony aggravator at penalty phase.

Affirmed in part, reversed in part, and remanded; petition granted in part and denied in part.

Wells, J., filed a specially concurring opinion.

West Headnotes (22)

[1] **Criminal Law**
- Deficient Representation in General

To show that counsel's performance was deficient, as element of ineffective assistance of counsel, defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
- Prejudice in General

To show that counsel's deficient performance prejudiced the defense, as element of ineffective assistance of counsel, defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
- Death Penalty Cases

Unless a capital defendant, who alleges ineffective assistance of counsel, shows both deficient performance and prejudice, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
- Prejudice in General

Prejudice, as element of ineffective assistance of counsel, is met only if there is a "reasonable probability" that but for counsel's unprofessional errors, the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

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1 Cases that cite this headnote

[5] Criminal Law
Necessity for Hearing

A defendant is entitled to an evidentiary hearing on a postconviction relief motion unless: (1) the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, or (2) the motion or a particular claim is legally insufficient.

1 Cases that cite this headnote

[6] Criminal Law
Necessity for Hearing

To obtain an evidentiary hearing on a postconviction relief motion, the movant bears the burden of establishing a prima facie case based upon a legally valid claim, and mere conclusory allegations are not sufficient to meet this burden.

1 Cases that cite this headnote

[7] Criminal Law
Interlocutory, Collateral, and Supplementary Proceedings and Questions

In cases where there has been no evidentiary hearing regarding the postconviction relief motion, the postconviction appellate court must accept the factual allegations made by the movant to the extent that they are not refuted by the record, must examine each claim to determine if it is legally sufficient, and, if so, must determine whether the claim is refuted by the record.

1 Cases that cite this headnote

[8] Criminal Law
Putting Jurors in Place of Victim; "Golden Rule" Arguments

Prosecutor's remarks during opening statement in capital murder trial, informing jury about threats received by co-defendant, who was indicted by grand jury but who testified at defendant's trial as State's key witness after the charges against co-defendant were dismissed, and stating that co-defendant "is the person I was [alluding] to in voir dire when I asked if you had ever been between a rock and a hard place," did not constitute an improper golden-rule argument; jurors were not asked to place themselves in the victim's position, and instead, the remarks referred to questions about fear that had been posed to the venire, which questions were relevant to whether each prospective juror would make a fair and impartial decision without personal bias.

Cases that cite this headnote

[9] Criminal Law
Putting Jurors in Place of Victim; "Golden Rule" Arguments

An improper "golden rule argument" is an argument in which an attorney asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror, or asks the jurors to imagine how they would feel if the victim were a relative.

1 Cases that cite this headnote

[10] Criminal Law
Putting Jurors in Place of Victim; "Golden Rule" Arguments

The "imaginary scenario" argument, in which the prosecutor asks the jurors to put their own imaginary words in the victim's mouth, is a subtle form of the improper "golden rule" argument.

1 Cases that cite this headnote

[11] Criminal Law
Hearing, Ruling, and Objections

Before expert testimony that co-defendant, who was indicted by grand jury but who testified at defendant's trial as State's key witness after the charges against co-defendant were dismissed, had displayed, with respect to the criminal episode, "a pattern of someone" who "ha[d] been terrorized, and someone who [had been] acting in response to a credible threat," could be introduced at guilt phase of defendant's

capital murder trial, a *Frye* hearing was required, to determine whether there was general acceptance of underlying scientific principles and methodology in the field of witness' expertise, i.e., the field of extreme techniques of influence and control; such testimony was not pure opinion testimony, and instead was syndrome testimony.

Cases that cite this headnote

[12] **Criminal Law**
⇐ Expression of Opinion as to Guilt of Accused

Prosecutor's remark, during closing argument at guilt phase of capital murder trial, that State charged defendant not only with premeditated murder, but also with murder committed during course of robbery or burglary, because the charges were "warranted," did not constitute an improper personal opinion from the prosecutor regarding the merits of State's case; rather, prosecutor was explaining that State filed multiple charges because each charge was based on different conduct, and prosecutor's remark was made in connection with prosecutor's description of each charge and description of evidence in the record showing that each charge was based on different actions. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[13] **Criminal Law**
⇐ Credibility of Other Witnesses

Prosecutor's closing argument at guilt phase of capital murder trial, asserting that co-defendant, who was indicted by grand jury but who testified at defendant's trial as State's key witness after the charges against co-defendant were dismissed, had initially refused to provide any information as to the identify of the assailant because he had been afraid for his safety and the safety of his family, did not constitute improper vouching for the credibility of a witness; prosecutor did not say that he believed that threats against co-defendant were real and believable, and while prosecutor suggested that co-defendant's testimony was credible, such suggestion was a fair reply to the defense's closing argument that co-defendant's testimony was not believable.

7 Cases that cite this headnote

[14] **Criminal Law**
⇐ Credibility and Character of Witnesses; Bolstering

It is improper for counsel to bolster a witness' testimony by vouching for his or her credibility, during closing arguments.

8 Cases that cite this headnote

[15] **Sentencing and Punishment**
⇐ Arguments and Conduct of Counsel

Prosecutor's remark, during opening statement at penalty phase of capital murder trial, that defendant's crimes were inexcusable, could not have misled the jury, though jury had been instructed, at guilt phase, on excusable homicide; the jury, by its guilt-phase verdict convicting defendant of first-degree murder, had rejected defendant's contention that "excusable homicide" applied to the facts.

Cases that cite this headnote

[16] **Criminal Law**
⇐ Argument and Comments

Counsel's allegedly deficient performance at penalty phase of capital murder trial, in failing to object to prosecutor's closing argument which allegedly denigrated mitigation, was not prejudicial, as element of ineffective assistance of counsel; sentencing judge found evidence supporting 11 nonstatutory mitigating factors and gave each factor some or little weight, but found three aggravating factors, i.e., that defendant had prior conviction for another capital felony or a felony involving use of violence or threat of violence to the person, that the capital felony was committed while defendant was engaged in or was an accomplice in commission of or attempt to commit burglary, robbery, and kidnapping, and that the capital

felony was especially heinous, atrocious, or cruel (HAC). U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[17] Sentencing and Punishment
⇐ Arguments and Conduct of Counsel

A prosecutor cannot improperly denigrate mitigation, during a closing argument at the penalty phase of a capital murder trial.

6 Cases that cite this headnote

[18] Habeas Corpus
⇐ Post-Conviction Motions or Proceedings
Habeas Corpus
⇐ Appeal, Error, or Other Direct Review of Conviction
Habeas Corpus
⇐ Post-Trial Proceedings; Sentencing, Appeal, Etc

While the issue of direct appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus, a claim of ineffective assistance of direct appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[19] Criminal Law
⇐ Appeal

In evaluating a claim of ineffective assistance of direct appellate counsel, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[20] Criminal Law
⇐ Appeal

The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based, which in the case of appellate counsel means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[21] Homicide
⇐ Attempt

Florida does not recognize a crime of attempted felony murder.

Cases that cite this headnote

[22] Sentencing and Punishment
⇐ Harmless and Reversible Error

Error was harmless beyond a reasonable doubt, as to allowing jury, at penalty phase of capital murder trial, to consider the non-existent crime of attempted felony murder, as prior violent felony aggravator; evidence established two other prior violent felony convictions to support the prior violent felony aggravator, including evidence that defendant had killed a four-year-old child with a baseball bat, evidence established two other aggravators, i.e., that the capital felony was committed while defendant was engaged in or was an accomplice in commission of or attempt to commit burglary, robbery, and kidnapping, and that the capital felony was especially heinous, atrocious, or cruel (HAC), and the case involved considerable aggravation and minimal mitigation.

Cases that cite this headnote

Attorneys and Law Firms

***1004** Kevin J. Kulik, Fort Lauderdale, Florida, for Appellant/Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida, and Lisa-Marie Lerner, Assistant Attorney General, West Palm Beach, Florida, for Appellee/Respondent.

Opinion

PER CURIAM.

Dana Williamson, an inmate under the sentence of death, appeals an order of the circuit court which summarily denied his motion to vacate his conviction of first-degree murder and sentence of death, filed pursuant to Florida Rule of Criminal Procedure 3.850. He also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

FACTS

Williamson was convicted of numerous crimes stemming from a criminal incident that occurred on November 4, 1988. The jury found Williamson guilty of first-degree murder, armed burglary, extortion, three counts of attempted murder, five counts of armed kidnapping, and four counts of armed robbery. On direct appeal, this Court summarized the facts surrounding the crime and the evidence presented at trial. *See Williamson v. State*, 681 So.2d 688, 690-94 (Fla.1996). The jury recommended death by a vote of eleven to one, a recommendation which the trial court followed. In his sentencing order, the trial judge found three aggravating factors [1] and eleven mitigating factors. [2]

On direct appeal, Williamson raised eight issues: (1) evidence about a crime for which Williamson was convicted in 1975 was erroneously admitted during the guilt phase; (2) the extortion count should have been severed from the trial; (3) the trial court erroneously admitted irrelevant evidence regarding certain legal papers, which was presented to show that Williamson knew about legal forms; (4) the jury's verdict was not supported by competent, substantial evidence; (5) the trial court improperly rejected certain mitigating factors, failed to give sufficient weight to several nonstatutory mitigating factors, and improperly found the HAC aggravating factor, thus resulting in an erroneous sentence of death; (6) section 921.141, Florida Statutes, is unconstitutional; (7) the trial court should have granted Williamson's motion to suppress his statement ***1005** to police; and (8) the trial court should have granted Williamson's motion for mistrial based on prosecutorial misconduct. This Court rejected each of Williamson's claims and affirmed his convictions and sentence of death. *Williamson*, 681 So.2d at 698.

In his motion for postconviction relief, Williamson raised eleven claims: (1) trial counsel was ineffective because he failed to object to the State's opening statement, which constituted an impermissible "golden rule" argument; (2) counsel was ineffective because he failed to object to the admission of a written waiver of immunity by the State's key witness despite the State's failure to disclose this document during discovery; (3) counsel was ineffective because he failed to impeach the State's sole eyewitness identification using the witness's original statement to the police; (4) counsel was ineffective because he failed to voir dire the State's expert witness on "influence and control," obviating a *Frye* hearing; [3] (5) counsel was ineffective because he failed to request a curative instruction after the court sustained a defense objection to testimony by the State's expert witness who vouched for the credibility of a key State witness; (6) counsel was ineffective because he failed to object to the State's unfairly prejudicial closing arguments; (7) counsel was ineffective because he failed to object to the State's characterization of the offense as "inexcusable"; (8) counsel was ineffective because he failed to object to the State's argument during the penalty phase that mitigating circumstances were "mere excuses"; (9) counsel was unauthorized to concede to Williamson's guilt during the penalty phase; (10) fundamental error occurred because the verdicts of attempted murder rested on the State's alternative theory of attempted first-degree felony murder, which became a nonexistent offense at the time that the convictions became final on direct appeal, requiring that the judgments and sentences be vacated pursuant to *State v. Gray*, 654 So.2d 552 (Fla.1995); and (11) based on this error, Williamson is entitled to a new penalty phase because these convictions tipped the jury's scales in favor of death. A *Huff* hearing [4] was held on July 23, 2004. On February 13, 2007, the postconviction trial court summarily denied all of the claims presented. Williamson files this appeal, raising all of the above claims except claim (9). He has also filed a petition for a writ of habeas corpus, raising the *Gray* claim.

We affirm the trial court's rulings in respect to all issues raised in the postconviction motion except those issues alleging that defendant's counsel was ineffective in failing to request a *Frye* hearing before the opinion testimony of the State's expert, Dr. Robert Ofshe, was admitted into evidence. On the issues concerning Dr. Ofshe's opinion testimony, we reverse

and remand for an evidentiary hearing. We deny in part the petition for a writ of habeas corpus and grant it in part.

ANALYSIS

[1] [2] [3] [4] In the majority of Williamson's claims, he asserts that his trial counsel was ineffective, based on numerous alleged errors. In order to establish a claim for ineffective assistance of trial counsel, Williamson must meet both requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed ***1006** the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

[5] [6] [7] In this case, the postconviction trial court denied all of Williamson's claims without holding an evidentiary hearing. In *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000), this Court provided the following standard for determining whether an evidentiary hearing is required in a postconviction proceeding:

> [A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

With these standards in mind, we turn to Williamson's claims.

[8] In his first claim, Williamson asserts that his trial counsel was ineffective in failing to object to a golden rule argument. Specifically, after the prosecutor informed the jury about the threats that Charles Panoyan received, the prosecutor commented, "Charles Panoyan is the person I was [alluding] to in voir dire when I asked if you had ever been between a rock and a hard place." The postconviction trial court denied this claim, holding that the statements did not reach the level of an impermissible golden rule argument because the prosecutor did not ask the jurors to place themselves in Panoyan's position. Instead, the court found that the questions about fear and behavior were posed to the venire because they were relevant as to whether a juror would make a fair and impartial decision without personal bias. The court further held that Williamson failed to allege how this comment prejudiced him.

[9] [10] This Court has defined a golden rule argument to be an argument where an attorney "asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." *Hutchinson v. State*, 882 So.2d 943, 954 (Fla.2004). This Court has also held that the "imaginary scenario" argument where the prosecutor asks the jurors to put his or her own imaginary words in the victim's mouth is a subtle form of the golden rule argument. *See, e.g., Urbin v. State*, 714 So.2d 411, 421 (Fla.1998). In reviewing Williamson's claim, we agree with the circuit court. The comment at issue here does not constitute an improper golden rule argument because it does not ask the jurors to place

***1007** themselves in the victim's position. Even if this was a golden rule argument, Williamson would still need to include sufficient allegations to demonstrate that his counsel was ineffective in failing to object to the prosecutor's statement and that he suffered prejudice as a result of that failure. This he has not done. Accordingly, we deny this claim.

Next, Williamson asserts that his counsel was ineffective in failing to object to the admission of a written waiver of immunity by the State's key witness, Panoyan, and that counsel was ineffective in failing to ensure that an adequate *Richardson*[5] hearing occurred. In this claim, however, postconviction counsel does not assert that the information itself was inadmissible. Instead, he asserts that counsel was ineffective in failing to object to the document because the State failed to disclose the waiver prior to trial. The postconviction court denied this claim, finding that a *Richardson* inquiry was held and that counsel would not be able to demonstrate any error with admitting the document because defense counsel had the opportunity to inquire into whether Panoyan had entered into any deals. The court further found that even if this was error, it was harmless. We agree.

In *Richardson,* this Court held that where a defendant points out a discovery violation, the trial court must make an adequate inquiry that at a minimum considers the following circumstances: "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." *Id.* at 775 (quoting *Ramirez v. State,* 241 So.2d 744 (Fla. 4th DCA 1970)). In reviewing the record in this case, we find that Williamson's assertion fails both the deficiency and prejudice prongs of *Strickland.* First, defense counsel did inform the trial court as to the problem. The trial court, in response, held a *Richardson* hearing at which the trial court inquired into each of the three necessary prongs as required by *Richardson.* When the court questioned the prosecutor about the failure to disclose the document, the prosecutor informed the judge that he thought he had given the written waiver to the defense, and any failure to disclose this document was inadvertent. The court asked defense counsel about the impact of the waiver and any prejudice he suffered, specifically asking counsel whether he previously knew if Panoyan had made a deal or not. Defense counsel did not inform the trial judge as to any effect the failure to produce this document would have had on Williamson's ability to properly prepare for trial. In fact, Williamson has not alleged how he was prejudiced in his trial defense by the admission of this document. As Williamson has not alleged sufficient allegations to support either *Strickland* prong, we deny this claim.

In his third claim, Williamson asserts that his trial counsel was ineffective in failing to question Panoyan as to a prior contradictory statement Panoyan initially gave to police officers when Panoyan told them that he never saw the assailant without his mask and could not determine even the assailant's race. The postconviction court denied relief as follows:

> Having reviewed the record, this Court agrees with the State that Capital Collateral Counsel initially mischaracterized Panoyan's November 1988 statements. Additionally, the jury was informed that Panoyan failed to identify the Defendant or his brother in Panoyan's initial statement to the police that evening, even though Panoyan provided ***1008** an account of what happened at the Decker home. However, he gave inaccurate information as to the identity of the assailant. On direct examination, the State elicited from Panoyan that because he was afraid, he gave an inaccurate description to the police because of what he saw at the Decker home that evening and what Dana Williamson said he would do to Panoyan's family.
>
> The record also reflects that defense counsel attacked Panoyan's credibility from the onset of the trial, starting with his opening statement arguing that "Panoyan was going to come in and tell the jury 'one hell of a story' to avoid the electric chair." Furthermore, defense counsel also reminded the jury that Panoyan was an original co-defendant in the case who never identified the Williamsons until three years after the crimes were committed and counsel also warned the jury that "the State had made a deal with the devil and that [the jury] should listen closely to Panoyan's account of the events which did not match ... the statements of the other two innocent victims."
>
> The instant record reflects that on Panoyan's cross examination, trial counsel did elicit from Panoyan that he was originally a defendant in the case, was arrested in May of 1990 and he was held without bond for eighteen months until he was "inexplicably" released on his own recognizance in November of 1992. Trial counsel also elicited testimony from Panoyan that he never requested a court order to be kept separate and apart from Williamson while both were held in the same jail during that year and one half (1/2) and that Panoyan maintained a "friendship" with Williamson, and he laughed and joked with Williamson in jail. Panoyan was also impeached as

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to his deposition testimony regarding how he had spent his time waiting for Robert Decker to return to his home and Panoyan was also impeached about the cowboy hat worn by Dana Williamson.

Contrary to the Defendant's assertions, this Court finds that trial counsel continued to attack Panoyan's credibility describing each of the conflicts in Panoyan's testimony and trial counsel was constantly reminding the jury that Panoyan was initially thought to have been guilty of the crimes.

State v. Williamson, No. 92-15642CF10A (Fla. 17th Jud. Cir. Ct. order filed Feb. 13, 2007) at 19-20 (*Huff* Order) (record citations omitted). We find no error in the postconviction trial court's conclusion that Williamson failed to demonstrate that his counsel was ineffective. As the postconviction court aptly pointed out, the jury was aware that Panoyan did not reveal any information about the assailant until three years after the crime, and defense counsel continuously attacked Panoyan's credibility throughout the trial. Since the record refutes Williamson's claim as to ineffective assistance of counsel, Williamson is not entitled to relief on this claim.

In his next two claims, Williamson asserts that his trial counsel was ineffective because counsel failed to voir dire State expert Dr. Ofshe, failed to request a *Frye* hearing for the novel science upon which Dr. Ofshe relied, and failed to request a curative instruction after the trial court sustained objections to Dr. Ofshe's testimony. As to these claims, the record reflects that during the trial, while the State was still presenting the testimony from Panoyan, the State asked if it could take a witness out of turn because its expert witness, Dr. Ofshe, needed to get back to California that night. Defense counsel informed the court that although counsel had read through the expert's statement and read through the expert's interview with Panoyan, defense counsel had not yet ***1009** had an opportunity to question this out-of-state expert witness. Defense counsel asked to question Dr. Ofshe before Panoyan's cross-examination began, asserting that he did not want his cross-examination of Panoyan to be split up by the expert witness. The trial judge agreed, and counsel was given an opportunity to talk to Dr. Ofshe. The State then called Dr. Ofshe and questioned him about his qualifications, establishing that Dr. Ofshe received a Ph.D. in sociology, specialized in tactics of influence, authored a book on individual decision-making, and authored numerous articles on the subject of extreme and extraordinary techniques of influence and control. The State tendered Dr. Ofshe as an expert in the field of extreme techniques of influence and control, and after defense counsel declined to voir dire the witness, the court declared him to be an expert in that subject.

On direct examination, Dr. Ofshe testified that he reviewed two depositions taken of Panoyan, examined statements Panoyan gave to the police, and interviewed Panoyan. Dr. Ofshe then provided his opinion as to this case:

Q. [The State] But did you have the opportunity to discern any kind of control or influence that had been exercised by Dana Williamson according to the attestation of Charles Panoyan, which degrees or kinds of control you recognized?

A. [Dr. Ofshe] Yes.

Q. Would you tell us, please.

A. Well, in reviewing the history of Mr. Panoyan's experience in connection with the invasion and the death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one [sic] of a better word, been terrorized, and someone who is acting in response to a credible threat, not only to himself, but also, and to some degree, more importantly, to members of his family.

And that the manner in which he responds at various points indicates quite clearly that he has a great concern about something happening to his family, which he revealed to me in the interview I did with him, and I gather, revealed again in testimony that you heard.

And there is a sequence over the course of his involvement that's consistent with this, including who he tried to compromise between the fear that he had for himself, the fear that he had for his family and his desire to aid the Decker family.

The point at which he chose to do certain things reflects the kind of threat and fear he was acting under, and the particular decisions that he made to me are completely consistent with what he says about the sort of threats that he was exposed to.

[11] We conclude that this testimony is the kind of expert opinion testimony which should have been tested by the trial court in accord with the *Frye* standard before the testimony was admitted into evidence. The postconviction court,

however, summarily denied Williamson's claim pertaining to the lack of any voir dire, first holding that this claim was insufficiently pled because Williamson failed to specifically allege what information he would have elicited to exclude Dr. Ofshe's testimony. We disagree that the claim was insufficiently pled. As a part of this claim, Williamson asserted that his trial counsel did not request a *Frye* hearing as to Dr. Ofshe and Dr. Ofshe's testimony that Panoyan's reaction fit the profile of one who had experienced the type of threat claimed by Panoyan. This Court has recognized in *Frye* hearings that "[t]he proponent of the evidence ***1010** bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1268 (Fla.2003). Because we conclude that this testimony required a *Frye* hearing, Williamson does not need to provide specific factual allegations as to what his trial counsel should have elicited from the expert. It was defense counsel's obligation to request a *Frye* hearing regarding the general acceptance of the underlying scientific principles and methodology, and if he had done so, the burden would have shifted to the State to show that Dr. Ofshe's testimony could meet the *Frye* test.

We recognize that the postconviction court did further hold that even if it reviewed the merits of the claim, summary denial of the claim was appropriate because there was competent and substantial evidence to support the trial court's finding that Dr. Ofshe was an expert in his field and his testimony was not subject to a *Frye* analysis because Dr. Ofshe was providing pure opinion testimony. We disagree.

As noted earlier, in accord with the *Frye* standard, we have held "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *Flanagan v. State*, 625 So.2d 827, 828 (Fla.1993) (quoting *Frye*, 293 F. at 1014). The postconviction trial court recognized our adherence to *Frye* and was correct in also recognizing that we have held that a *Frye* hearing is not necessary in respect to what we have characterized as "pure opinion" testimony. *See Flanagan*, 625 So.2d at 828. But we do not agree with the circuit court that Dr. Ofshe's testimony was such "pure opinion testimony." We conclude that Dr. Ofshe's testimony was the kind of expert testimony which we held in *Flanagan* and in *Hadden v. State*, 690 So.2d 573 (Fla.1997), to require a *Frye* evaluation by the trial judge. In *Hadden*, the State proffered expert opinion testimony from a mental health counselor which was "offered to prove the alleged victim of sexual abuse exhibit[ed] symptoms consistent with one who has been sexually abused." *Id.* at 575. Defense counsel objected, asserting that the testimony lacked scientific reliability. The trial court overruled the objection and permitted the expert to testify. Hadden was subsequently convicted of lewd assault. On appeal, the First District Court of Appeal held that this testimony did not need to be subject to a *Frye* test because this type of expert testimony was not new or novel or, alternatively, the testimony was opinion testimony not covered by *Frye*. *Id.* at 576. This Court disagreed, holding that syndrome testimony in child abuse prosecutions is not pure opinion testimony.

In this case, Dr. Ofshe testified that Panoyan "displayed a pattern of someone who has ... been terrorized, and someone who is acting in response to a credible threat." We find that, similar to *Hadden*, this was syndrome testimony and should have been tested as to whether it was sufficiently established to have general acceptance in the particular field in which it belongs. *Frye*, 293 F. at 1014. We find summary denial of this claim is inappropriate and thus reverse the circuit court's order and remand the claim for an evidentiary hearing. At the evidentiary hearing, the circuit court should consider evidence concerning the effectiveness of counsel, including the reasons counsel failed to request a *Frye* hearing. In respect to prejudice, the circuit court is to make a determination as to whether this evidence was generally accepted in its particular field. If the circuit court determines ***1011** that the evidence should not have been admitted into evidence, the court should determine whether the admission of the evidence was prejudicial under *Strickland*, i.e., whether there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. As we stressed above, "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In a related claim, Williamson asserts that his counsel was ineffective in failing to request a curative instruction after the court sustained an objection pertaining to Dr. Ofshe's opinion as to whether the threat was credible. The postconviction trial court denied this claim, finding that Williamson mischaracterized the circumstances surrounding Dr. Ofshe's testimony because after trial counsel objected to Dr. Ofshe's testimony, the court conducted a sidebar conference so that the jury did not hear Dr. Ofshe's answer to the question to which counsel objected. We find that the

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postconviction court interpreted the defendant's claim too narrowly. In looking to the specific claim that Williamson presents, Williamson does not assert that trial counsel was ineffective because the jury heard testimony and argument presented during the sidebar conference. Instead, Williamson asserts that his counsel was ineffective because counsel resisted only at sidebar when the State attempted to link a hypothetical with the believability and credibility of the threat to which Panoyan testified and that his counsel was ineffective when the trial court sustained his objections and counsel did not seek curative instructions based on the prior testimony. Since the actual statements to which defense counsel objects are the subject of the claim upon which we reverse and remand for an evidentiary hearing, we likewise remand this claim to the postconviction court for an evidentiary hearing.

[12] In his sixth claim, Williamson asserts that his counsel was ineffective in failing to object to three comments during the State's closing argument. In his first subclaim, Williamson objects to a portion of the closing argument where the prosecution stated that it filed the charges because they were warranted. Specifically, the prosecutor made the following argument:

> Let me summarize for you what the law is basically about with respect to the charges that Dana Williamson is accused. He's charged with murder in the first degree. [You're] going to learn, ladies and gentlemen, there are two ways to commit murder in the first degree. One is premeditated murder, conscious intent to kill....
>
> The other way to commit first degree murder is if someone dies or is killed during the course of committing a robbery or burglary. Which is also known as armed burglary. A burglary is a crime against property, against house. You also have robbery at the same time because you have people inside the house. Robbery is a crime against persons.
>
> You better believe that we filed the charges, because it's warranted. Robbery against each person in the house who had property in the house that was taken or any control over that property. Burglary against house and two vehicles that were taken or anything taken out of the house.
>
> So, as you analyze these counts, and let's go down them. We have murder in the first degree of Donna Decker, and also the attempted murder after Bob, Clyde and Carl. Armed burglary of Bob and Donna Decker's home where the property was taken.

*1012 The prosecutor went on to describe the armed burglary of Bob Decker's van, armed burglary of Charles Panoyan's truck, kidnapping of all of the victims, and armed extortion against Charles Panoyan, discussing how the evidence supported each of the charges against Williamson. The postconviction court denied this claim, holding that the prosecutor's statement was a "fair comment on the evidence, and even if there was an error, the error was not fundamental and would have been harmless beyond a reasonable doubt." *Huff* Order at 27.

In *Ruiz v. State*, 743 So.2d 1 (Fla.1999), this Court held that an attorney's role in closing arguments is to simply assist the jury in analyzing, evaluating, and applying the evidence, including the attorney's suggestions as to what conclusions can be drawn from the evidence. *Id.* at 4. An attorney cannot, however, obscure the jury's view with personal opinion about the merits of the case or the credibility of the witnesses. *Ruiz* explicitly warned that "[i]t is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney ... as a basis for conviction of a criminal defendant." *Id.* at 4. In *Ruiz*, the prosecutor stated in her closing argument, "What interest do we as representatives of the citizens of this county have in convicting somebody other than the person-," to which the defense objected. *Id.* at 5. The Court found that this statement, in conjunction with two other very prejudicial closing arguments, required a reversal because the "integrity of the judicial process [was] compromised and the resulting convictions and sentences irreparably tainted." *Id.* at 7.

In reviewing the closing statement in its full context, we find that the comment at issue is not of the same nature as *Ruiz* where the prosecutor clearly used the prosecutor's personal status as the government's attorney as a basis for the conviction. The argument at issue here is not a comment wherein the prosecutor was giving his personal opinion that he believed Williamson was guilty-instead, the statement was to explain that the State filed so many charges because each charge was based on different conduct. The State made this comment when describing each of the charges and then immediately pointed out the evidence in the record to show that each charge was based on different actions. [6]

This case also differs from *Ruiz* because *Ruiz* was before the Court on a direct appeal. In *Bell v. State*, 965 So.2d 43 (Fla.2007), this Court described the difference between raising such claims in a postconviction claim and in a direct

appeal claim. As this Court explained, "In a direct appeal review, there is no prejudice prong consideration like there is in consideration of a claim of ineffective assistance of counsel in a postconviction claim under *Strickland*." *Id.* at 61. Here, the trial record does not support Williamson's claim that the comment resulted in the prejudice required by *Strickland*. Accordingly, we deny this subclaim.

[13] In his second subclaim, Williamson asserts that during part of the closing argument, the prosecutor impermissibly vouched for Panoyan's credibility. The record shows that after defense counsel attacked Panoyan's credibility and asserted that Panoyan told several different versions of his story, the prosecutor replied in his closing argument that Panoyan told one consistent version, other than refusing to provide any information as to the assailant because he was afraid for his safety ***1013** and the safety of his family. The prosecutor then stated as follows:

> And as Doctor [Ofshe] testified, this is not unusual. This is something that when somebody is subjected to very real, believable threats, that when he knows that the accuser or threatener is able to carry it out, it is something a human being can react inappropriately to and be subjected to coercion and can come under the influence of the coercive party, particularly when you're in between a rock and a hard place.
>
> ....
>
> We know that Charles Panoyan there came a point that he was released. [Defense counsel] says, well, how do we know whether or not he was tied up too? Well, we have Charles Panoyan's testimony. [Defense counsel] criticizes other aspects of Charles Panoyan's testimony. He says to you, just on the faith of Charles Panoyan's testimony alone. Which I suggest to you is credible.
>
> You had an opportunity to review his demeanor and the way he answered the questions.

The postconviction court denied this portion of the claim, finding that when this portion of the closing argument is read in context, the prosecutor did not vouch for the witness's credibility. The postconviction court further held that the arguments were a "fair reply" to defense counsel's assertion in closing arguments that the jury should not believe Panoyan.

[14] This Court has long recognized that "[i]t is improper to bolster a witness' testimony by vouching for his or her credibility." *Gorby v. State*, 630 So.2d 544, 547 (Fla.1993). As this Court later explained, "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Hutchinson*, 882 So.2d at 953. In turning to the challenged statements here, when the statements at issue are viewed in their context, we agree with the postconviction court that the prosecutor did not vouch for the credibility of the witness. The prosecutor did not say that he believed the threats were real and believable. Moreover, while the prosecutor suggested Panoyan's testimony was credible, this was a fair reply to the defense's closing argument that Panoyan's testimony was not believable. Immediately after this statement, the prosecutor asked the jury to think about Panoyan's demeanor and how he answered the questions, encouraging the jurors to rely on their own impressions as to the witness's credibility. In *Dailey v. State*, 965 So.2d 38, 44 (Fla.2007), this Court rejected a similar contention, holding that the prosecutor's alleged improper vouching for a state witness was a fair comment in response to defense counsel's attack on the witness's credibility during closing argument when defense counsel referred to the witness as a "professional thief" and a poor police officer. *See also Rogers v. State*, 957 So.2d 538, 548 (Fla.2007) (rejecting the defendant's position that the State improperly bolstered certain witnesses because such statements were in response to defense attacks as to witness credibility; further holding that the postconviction court did not err in summarily denying the claims without an evidentiary hearing since there was no factual dispute as to what each attorney said during their respective arguments).

In his final subclaim on this issue, Williamson asserts that his trial counsel was ineffective in failing to object when the prosecutor stated that there was another victim who did not testify. Specifically, the prosecutor made the following argument in closing:

> There's another witness that you didn't hear from, because he's a child and he's a baby. He's still a baby. He's ***1014** just 9 years old. He saw this piece of bathrobe around his mother's neck. I submit to you, ladies and gentlemen, that how I know is because Yvonne Rutherford came on the witness stand and told you, among other things, the worst thing I had to do was tell this little boy that his momma died.
>
> And this is what he was doing, he's putting a gag around his toy's mouth, and that's not right. And used his hand like a knife was in it and was stabbing at the doll. What does this tell us? That he's a witness to everything that happened

that night, including his mother's location in the hallway. His mother losing her life in that hallway that night. Donna Decker fought for her life that night.

The postconviction court denied this claim, holding that the jury was well aware that the child was a witness to the events and that even if the comment was improper, it did not give rise to an error in which there would have been a reasonable probability that the outcome of the proceeding would have been different. We agree with the postconviction court. The prosecutor did not rely on non-record evidence. The jury heard significant evidence regarding the crimes which occurred that night, including testimony that Carl was taken to the back room and shot in the head even though he was just two because Williamson thought Carl would be able to identify him. None of the statements pointed out by Williamson involve statements where the State was relying upon non-record evidence. Since the statements were not improper, we deny the claim that defense counsel was ineffective for failing to object to them.

[15] In his seventh claim, Williamson asserts that his trial counsel was ineffective when he failed to object to closing arguments in the penalty phase when the prosecutor called the crimes inexcusable, particularly since the trial court instructed jurors on excusable homicide. During its opening statement at the penalty phase, the State made the following argument:

> And listen, ladies and gentlemen, to the mitigating circumstances. And as you listen to them, as you listen to these excuses, think about whether or not these excuses outweigh the inexcusable thing he did. The inexcusable thing that Dana Williamson did to Donna Decker. Inexcusable thing he did to Donna Decker's family. Her husband. Her father-in-law. Her baby.

The postconviction court denied this claim, finding that defense counsel was not ineffective for failing to object "because it is abundantly clear that the jury could not have been [misled] by that comment, after having already found the Defendant guilty of Donna Decker's homicide." We find no error in the circuit court's conclusion. Defense counsel had no grounds upon which to object to this comment during the penalty phase. By its guilt-phase verdict, the jury had rejected Williamson's contention that "excusable homicide" applied to the facts. Thus, the comment that the crimes were inexcusable, which was made during the penalty phase, could not mislead the jury as to a decision which they already made during the guilt phase.

[16] [17] In his next claim, postconviction counsel attacks the same penalty-phase closing argument, asserting that trial counsel was ineffective in failing to object to the word "excuses" when the prosecutor stated, "And as you listen to them, as you listen to these excuses, think about whether or not these excuses outweigh the inexcusable thing he did." This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument. *See Brooks v. State*, 762 So.2d 879, 904 (Fla.2000) (holding that characterizing mitigating circumstances as ***1015** "excuses" was an improper denigration of the case offered in mitigation). However, we do not reach the assertion in this claim that counsel was ineffective under *Strickland* because we find no error in the postconviction court's determination that Williamson failed to meet the prejudice prong of *Strickland*. The sentencing judge found three aggravating circumstances: (1) Williamson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Williamson was engaged or was an accomplice in the commission of or an attempt to commit burglary, robbery, and kidnapping; and (3) the capital felony was especially HAC. As detailed above, he found evidence supporting eleven nonstatutory mitigating factors and gave each factor some or little weight. In reviewing the comments in light of the record, we do not conclude that the brief mention of the word "excuses" undermines confidence in the outcome. Thus, we affirm the postconviction court's ruling; even accepting Williamson's allegations as true, his allegations do not establish prejudice.

In his final claims, Williamson asserts that this Court should vacate his convictions for attempted murder based on the Court's decision in *Gray*. Williamson actually presents three separate claims based on *Gray*: (1) the likelihood that the verdicts in Counts II through IV rested on the State's alternative theory of attempted first-degree felony murder constitutes a fundamental error and requires that the judgments for attempted murder be vacated and set aside; (2) fundamental error requires a new penalty-phase trial because the attempted first-degree felony murder convictions tipped the jury's scales in favor of a death recommendation; [7] and (3) a habeas claim that appellate counsel was ineffective in failing to raise a *Gray* error on direct appeal.

[18] [19] [20] Because the claim is better addressed as an ineffective assistance of appellate counsel claim, we start our analysis by reviewing the petitioner's burden in such claims.

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986). The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See* ***1016** *Knight v. State*, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001.

Freeman, 761 So.2d at 1069 (some citations omitted).

[21] Williamson was convicted of three counts of attempted murder. One of the alternative bases for these convictions was based on the crime of attempted first-degree felony murder. At the time of the trial, this Court had affirmatively held that attempted felony murder was a crime in this state. *See Amlotte v. State*, 456 So.2d 448, 449 (Fla.1984). Justice Overton dissented, stating that "the crime of felony murder is based upon a legal fiction which implies malice aforethought from the actor's intent to commit the underlying felony"; thus, extending the felony murder doctrine to attempted felony murder "make[s] intent irrelevant for purposes of the attempt crime" and is "illogical and without basis in law." *Amlotte*, 456 So.2d at 450-51 (Overton, J., dissenting). While Williamson's case was on appeal before this Court, we issued our opinion in *State v. Gray*, 654 So.2d 552 (Fla.1995), which receded from *Amlotte* and held that "the application of the majority's holding in *Amlotte* has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position." *Id.* at 553. The Court held that the *Gray* decision "must be applied to all cases pending on direct review or not yet final." *Id.* at 554. Appellate counsel did not raise the *Gray* claim, even though our holding in *Gray* would have required that this Court reverse the convictions for attempted first-degree murder. *See, e.g., Mungin v. State*, 689 So.2d 1026, 1030 (Fla.1995) (holding that a "general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory") (footnotes omitted); *Valentine v. State*, 688 So.2d 313, 317 (Fla.1996) (reversing convictions for attempted first-degree murder based on *Gray* where the jury's verdict may have relied on a legally unsupportable theory). We find that Williamson has shown that his appellate counsel was ineffective in failing to raise this claim, and the error in failing to raise this claim undermines confidence in the correctness of these particular convictions. Accordingly, we vacate Williamson's convictions and sentences for attempted first-degree murder.

[22] Williamson alleges that he is entitled to a new penalty-phase trial because the death sentence rested in part on the aggravating circumstance that Williamson was convicted of a felony involving the use or threat of violence which, in turn, was supported in part by the convictions for attempted first-degree murder. Contrary to Williamson's assertion, we conclude that this error does not require a new penalty-phase trial because it had no effect on the sentence of death. Even without the convictions for attempted first-degree murder, we are convinced beyond a reasonable doubt that the death penalty would have been imposed given the nature and extent of the remaining aggravating and mitigating circumstances. Evidence presented during Williamson's trial established two other prior violent felony convictions to support the prior violent felony aggravator, including evidence that Williamson had killed a four-year-old child with a baseball bat. Moreover, this case involved considerable aggravation and minimal mitigation, especially in considering the quality of the mitigation presented. The jury's consideration of the convictions for attempted first-degree murder is harmless beyond a reasonable doubt. *See also Valentine*, 688 So.2d at 317 (holding that defendant was not entitled to new penalty-phase trial even where court reversed his conviction ***1017** for attempted first-degree murder based on *Gray*); *Owen v. State*, 596 So.2d 985, 989-90 (Fla.1992) (rejecting claim that defendant was entitled to new penalty-phase trial after trial court used three convictions which were later reversed because sentence would have been the same based on nature and extent of other evidence in aggravation).

CONCLUSION

We affirm the postconviction trial court's order denying postconviction relief, with the exception of the claims pertaining to Dr. Ofshe. As to those claims, we remand for an evidentiary hearing and direct the court to address both whether this alleged error constitutes ineffective assistance of counsel and whether prejudice occurred. With regard to Williamson's petition for a writ of habeas corpus, we hold that Williamson has met his burden of establishing that his appellate counsel was ineffective for failing to raise the *Gray* claim and that he suffered prejudice from this failure. Thus, we grant in part the petition for a writ of habeas corpus and vacate Williamson's convictions and sentences for attempted first-degree murder. We deny his habeas petition to the extent that he asserts that this error affects his conviction for first-degree murder and his sentence of death.

It is so ordered.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, and LEWIS, JJ., concur.

WELLS, J. specially concurs with an opinion.

CANADY and POLSTON, JJ., did not participate.

WELLS, J., specially concurring.

I concur with the majority opinion in all parts except that I would reverse and remand for a new trial rather than an evidentiary hearing. The decision as to guilt in this case was essentially a decision as to the credibility of Mr. Panoyan. I conclude that the admission of the testimony of Dr. Ofshe was error and that the error was prejudicial because Dr. Ofshe's testimony improperly bolstered the credibility of Mr. Panoyan.

I concur that counsel was ineffective for not requesting a *Frye* hearing[8] before Dr. Ofshe was allowed to express his opinion to the jury. However, my analysis goes one step further. I would hold that Dr. Ofshe's opinion testimony was sufficiently similar to the profile and syndrome testimony we found to be inadmissible in *Flanegan v. State*, 625 So.2d 827 (Fla.1993), and *Hadden v. State*, 690 So.2d 573 (Fla.1997), that the opinion testimony should have been held inadmissible under *Frye*. I specifically point to Dr. Ofshe's stated methodology of reaching his conclusions by comparing Mr. Panoyan's history and the "pattern he displays with the pattern of someone who has been terrorized." In *Hadden*, we held that the appropriate standard of review of the *Frye* issue is de novo. I would here make the decision that Dr. Ofshe's testimony was not generally accepted in the relevant field.

I believe that the relevant field would be psychology.[9] Dr. Ofshe's opinion was found to lack acceptance in the relevant scientific community in *United States v. Fishman*, 743 F.Supp. 713 (N.D.Cal.1990). In *Fishman*, the Court stated that neither the American Psychological Association ***1018** nor the American Sociological Association had endorsed the views of Dr. Ofshe on coercive persuasion. *Id.* at 717. An Illinois court affirmed the exclusion of Dr. Ofshe's testimony on the basis of *Frye* in *People v. Rivera*, 333 Ill.App.3d 1092, 267 Ill.Dec. 557, 777 N.E.2d 360 (2001). I agree with these decisions.

Additionally, though not specifically argued as a basis for reversal of the trial court's denial of postconviction relief, I also find defense counsel was ineffective in not objecting to Dr. Ofshe's testimony on the basis that the opinions of Dr. Ofshe were not of such a nature as to require any special knowledge or experience for the jury to form conclusions as to the subject about which Dr. Ofshe opined. In *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980), we noted that expert testimony should be excluded where the facts testified to are of such a nature as to not require any special knowledge or experience in order for the jury to form conclusions from the facts.

The essence of Dr. Ofshe's opinion was that based on Mr. Panoyan's testimony regarding what he witnessed during the Decker crimes and knowledge about Williamson's prior violent criminal act, Mr. Panoyan's earlier contrary statements to the police were made out of fear that Williamson would harm his family. I conclude that the jury was capable of evaluating the credibility of Mr. Panoyan on the basis of its own knowledge and experience. If the jury believed Mr. Panoyan, the jury did not need expert opinion as to whether Mr. Panoyan would fear for his family. Dr. Ofshe only served the purpose of being a witness with academic credentials who bolstered the credibility of Mr. Panoyan with an opinion which was within the common experience of average jurors.

Furthermore, I conclude that under the circumstances of this case, Dr. Ofshe's testimony was prejudicial. The State relied upon Dr. Ofshe's testimony in its closing argument. The value

of hearing an expert vouch for Mr. Panoyan clearly could have tipped the scales in this tragic case. Dr. Ofshe's testimony undermines my confidence in the verdict.

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Footnotes

1 The trial court found the following aggravators: (1) Williamson had been convicted of a prior violent felony; (2) the murder was committed during the commission of a burglary, robbery, and kidnapping; and (3) the murder was especially heinous, atrocious, or cruel (HAC).

2 The trial court found the following mitigators: (1) Williamson had an exceptionally unhappy and unstable childhood; (2) he was deprived of parental love; (3) Williamson's life and psychological makeup were emotionally unstable; (4) Williamson's birth was "an accident"; (5) he was aware of the physical, emotional, and sexual abuse suffered by his mother; (6) Williamson was incarcerated at an early age; (7) Williamson was beaten as a child; (8) he spent many years in prison; (9) Williamson has little education; (10) he had a deprived childhood; and (11) his demeanor at trial was calm and under control.

3 *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

4 *Huff v. State*, 622 So.2d 982 (Fla.1993).

5 *Richardson v. State*, 246 So.2d 771 (Fla.1971).

6 While we do not find this comment to be a basis upon which to grant postconviction relief, we again point out to prosecutors that such comments should not be made.

7 During oral argument, counsel also asserted that Williamson's conviction for first-degree murder also may have rested upon whether he was guilty of attempted murder, and hence this conviction, too, should be vacated. The record shows that while the first-degree murder conviction relied upon the alternative theory of felony murder, the felony murder charges did not rely on the crime of attempted murder. As to the second element of felony murder, the jury was instructed that it could find Williamson guilty of felony murder only if it found that the death of Donna Decker occurred as a consequence of the commission of, or attempt to commit, a robbery or burglary, or if it occurred as a consequence of escaping from the immediate scene of a robbery or burglary.

8 *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

9 I believe that counsel should have objected to Dr. Ofshe's expertise in the field of psychology since Dr. Ofshe had a degree in sociology. Moreover, Dr. Ofshe's career experience was teaching sociology, not psychology.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.701 Opinion testimony of lay witnesses.—If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 494, ch. 95-147.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 1, ch. 2013-107.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.403 Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; ss. 6, 22, ch. 78-361; ss. 1, 2, ch. 78-379.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.901 Requirement of authentication or identification.—Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.902 Self-authentication.—Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(1) A document bearing:

(a) A seal purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof; the Panama Canal Zone; the Trust Territory of the Pacific Islands; or a court, political subdivision, department, officer, or agency of any of them; and

(b) A signature by the custodian of the document attesting to the authenticity of the seal.

(2) A document not bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in subsection (1), affixed in the officer's or employee's official capacity.

(3) An official foreign document, record, or entry that is:

(a) Executed or attested to by a person in the person's official capacity authorized by the laws of a foreign country to make the execution or attestation; and

(b) Accompanied by a final certification, as provided herein, of the genuineness of the signature and official position of:

1. The executing person; or

2. Any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

The final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. When the parties receive reasonable opportunity to investigate the authenticity and accuracy of official foreign documents, the court may order that they be treated as presumptively authentic without final certification or permit them in evidence by an attested summary with or without final certification.

(4) A copy of an official public record, report, or entry, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with subsection (1), subsection (2), or subsection (3) or complying with any act of the Legislature or rule adopted by the Supreme Court.

(5) Books, pamphlets, or other publications purporting to be issued by a governmental authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Commercial papers and signatures thereon and documents relating to them, to the extent provided in the Uniform Commercial Code.

(9) Any signature, document, or other matter declared by the Legislature to be presumptively or prima facie genuine or authentic.

(10) Any document properly certified under the law of the jurisdiction where the certification is made.

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity,

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 501, ch. 95-147; s. 3, ch. 2003-259.

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Supreme Court of Florida

October 11, 1990

No. 71,505

Reporter

570 So. 2d 902 | 1990 Fla. LEXIS 1366 | 15 Fla. L. Weekly S 531

DOMINICK **OCCHICONE**, Appellant, v. STATE OF FLORIDA, Appellee

Subsequent History: Released for Publication December 26, **1990**. Rehearing Denied December 26, **1990**.

Prior History: An Appeal from the Circuit Court in and for Pasco County, Lawrence E. Keough, Judge - Case No. 86-01355CFAWS.

Core Terms

murder, premeditated, trial court, sentence, burglary, guilt, felony, aggravating factor, no merit, convictions, insanity, killing, woman's, argues, shot

Case Summary

Procedural Posture

Defendant appealed the judgment of the Circuit Court in and for Pasco County (Florida) convicting him of first-degree murder and sentencing him to death.

Overview

Defendant cut the telephone lines of his former girlfriend's house and roused the household. When the woman's father confronted defendant, defendant shot him. The woman and her daughter fled. Defendant shot the woman's mother four times. Defendant was convicted following a jury trial of two counts of first-degree murder. The jury recommended death for each count. The trial court sentenced defendant to life imprisonment for killing the woman's father and to death for killing her mother. Defendant appealed. The court affirmed, holding that the trial court did not abuse its discretion in allowing prosecutorial opening argument regarding defendant's insanity defense, denying a mistrial based on a spectator's comment, allowing testimony of defendant's refusal to take a hand swab test, and failing to tell defendant that he had the right to testify. The evidence was sufficient to support defendant's convictions, the evidence supported the cold, calculated, and premeditated aggravating factor, the sentence of death was not disproportionate, and defendant failed to preserve the trial court's failure to define the crime of burglary.

Outcome

The court affirmed defendant's convictions and sentences, holding that the trial court did not abuse its discretion in allowing opening argument regarding defendant's insanity defense, denying a mistrial based on a spectator's comment, admitting defendant's refusal to take a hand swab test, and failing to tell defendant of his right to testify. The evidence supported defendant's convictions, the aggravating factors, and the death sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Opening Statements
Criminal Law & Procedure > Defenses > Insanity > General Overview
Criminal Law & Procedure > Defenses > Insanity > Insanity Defense
Criminal Law & Procedure > Appeals > Standards of Review
> General Overview

HN1 Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence. The control of comments is within the trial court's discretion. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Defenses > Diminished Capacity
Criminal Law & Procedure > Defenses > Intoxication

HN2 Evidence of an abnormal mental condition not constituting legal insanity is inadmissible to prove that a defendant could not have formed the specific intent needed to be held responsible for committing a crime. The intoxication defense is still allowed if it can be shown that defendant was unable to entertain the requisite intent of premeditation. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Criminal Law & Procedure > Appeals > Standards of Review
> General Overview

HN3 When there is a legal basis to support finding an aggravating sentencing factor, the reviewing court will not substitute its judgment for that of the trial court. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview
Civil Procedure > ... > Jury Trials > Jury Instructions > Objections
Civil Procedure > Appeals > Reviewability of Lower Court Decisions

> Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

HN4 In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN5 If the state proceeds in the guilt phase on theories of both premeditated and felony murder, the underlying felony must be defined. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN6 The state need not charge and convict of felony murder or any felony in order for a court to find the aggravating factor of murder committed during the course of a felony. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

HN7 The jury does not have to specify what factors it relied on in making its sentencing recommendation. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Trials > Jury Instructions > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Governments > Legislation > Vagueness

HN8 Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel are not unconstitutionally vague. *Shepardize* - Narrow by this Headnote

Counsel: James Marion Moorman, Public Defender and Douglas S. Connor, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Appellant.

Robert A. Butterworth, Attorney General and Peggy A. Quince, Assistant Attorney General, Tampa, Florida, for Appellee.

Judges: Shaw, C.J., and Overton, McDonald, Ehrlich and Barkett, JJ., concur. Grimes, J., concurs with an opinion, in which Ehrlich, J., concurs. Kogan, J., concurs in part and dissents in part with an opinion.

Opinion by: PER CURIAM

Opinion

[903] PER CURIAM.

Dominick **Occhicone** appeals his convictions of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm both his convictions and sentence.

[904] In the early morning hours of June 10, 1986 **Occhicone** awakened his former girlfriend by knocking on the sliding glass door to her bedroom in a house she shared with

her children and her parents. The woman refused to talk with him and he left. He returned an hour or so later, armed with a handgun, and cut the telephone lines and roused the household. When the woman's father confronted him outside the house, **Occhicone** shot him. The woman and her daughter fled the house while **Occhicone** was breaking into it through a locked door. Once inside **Occhicone** shot the woman's mother four times. A jury found **Occhicone** guilty of two counts of first-degree murder and recommended death for each count. The trial court sentenced **Occhicone** to life imprisonment for killing the woman's father and to death for killing her mother.

As his first point on appeal, **Occhicone** argues that, during opening argument, the state anticipated his defense of insanity and argued proof that never came into evidence and that the trial court erred in overruling his objection to the prosecutor's opening statements. 1 HN1 Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence. *Whitted v. State*, 362 So. 2d 668 (Fla. 1978). Our review of the record discloses no more than a good faith attempt to do that. Insanity had not been abandoned as a defense at that point, and we do not see how the prosecutor's brief reference to physicians being expected to testify at trial prejudiced **Occhicone**. The control of comments is within the trial court's discretion. *Breedlove v. State*, 413 So. 2d 1 (**Fla.**), *cert. denied*, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). **Occhicone** has shown no abuse of discretion, and we find no merit to this point.

Occhicone also argues that the court erred in not granting his motion for mistrial based on a spectator's alleged misconduct. During voir dire, according to **Occhicone**, a spectator told a prospective juror that she thought **Occhicone** was guilty. When brought to its attention, the court questioned the spectator and **Occhicone**'s niece, the person who claimed to have overheard the comments. Afterwards, the court denied **Occhicone**'s motion for mistrial, finding that the jury pool had not been tainted. The court told defense counsel that he could ask the prospective jurors if they had heard the spectator say anything, but counsel did not so inquire during voir dire. The trial court promptly considered this alleged impropriety, and **Occhicone** has shown no abuse of discretion in the court's actions or rulings.

Occhicone relied on diminished capacity as a defense. 2 To refute **Occhicone**'s claim that his state of constant intoxication prevented his knowing what he was doing, the state presented a deputy's testimony as to **Occhicone**'s refusal to allow his hands to be swabbed for an atomic absorption test. The deputy stated that **Occhicone** pulled his hands away and said: "You're going to have to force me to [take the test]." The defense

did not object to this testimony, but, later, tried to object to its admission. The court found the objection untimely because, at a bench conference prior to the deputy's testimony, the prosecutor stated exactly what the deputy would say and defense counsel did not object at that time or when the deputy testified. The prosecutor commented on this testimony during closing argument, and defense counsel objected to that comment.

Occhicone now argues that allowing the prosecutor to comment on his refusal to **[905]** take the hand swab test constituted penalizing him for exercising his post-Miranda 3 rights. We disagree and find **Occhicone**'s reliance on *Herring v. State*, 501 So. 2d 19 (Fla. 3d DCA 1986), misplaced. In *Herring* the prosecutor argued that Herring's refusal to have his hands swabbed was convincing proof of his consciousness of his guilt. Herring's counsel objected to this argument, and the district court found reversible error. Here, on the other hand, the prosecutor commented on the evidence only to refute **Occhicone**'s claim of diminished capacity, not to demonstrate his guilt, and defense counsel did not object in a timely manner. We find no merit to this issue.

We also find no merit to **Occhicone**'s claim that the trial court erred in not telling **Occhicone** specifically that he had the right to testify in his own behalf. As **Occhicone** concedes, we decided this issue in *Torres-Arboledo v. State*, 524 So. 2d 403 (**Fla.**), *cert. denied*, 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 239 (1988), and we decline his invitation to revisit it.

Our review of the record discloses sufficient evidence to support **Occhicone**'s convictions, and we affirm them.

The trial court found that three aggravating factors had been established: previous conviction of a violent felony; committed during a burglary; and cold, calculated, and premeditated. **Occhicone** now argues that the last factor should not have been found. The totality of the circumstances relied upon by the trial judge 4 support his finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. *HN3* When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court and, therefore, affirm this finding. The other aggravating factors are well supported by the record.

Using as a predicate his claim that the court should not have found cold, calculated, and premeditated, **Occhicone** also argues that death is disproportionate in his case. The cases he relies on are factually distinguishable. This case involved substantially more than a passionate obsession; it was the culmination of avowed threats to terminate the lives of

parents standing between **Occhicone** and his former girlfriend. We do not find death a disproportionate sentence here.

Occhicone also claims the court committed reversible error in not defining the crime of burglary when instructing the jury on the aggravating factor of murder committed during the course of a burglary. We find no merit to this claim for several reasons. During the sentencing proceeding charge conference, **Occhicone** objected to all of the proposed aggravating circumstances. Regarding the instant one, he argued that "the facts, evidence and circumstances" did not support it. After hearing argument from both sides, the court held that the state could argue this factor and that the jury would be instructed on it. **Occhicone** did not object again and, most importantly, did not object on the **[906]** specific ground now advanced, i.e., failure to define burglary, or request the giving of such definition. "HN4 In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987). This claim, therefore, has not been preserved.

Even if the issue had been preserved, however, we would find any error regarding this instruction harmless. HN5 If the state proceeds in the guilt phase on theories of both premeditated and felony murder, the underlying felony must be defined. *Franklin v. State*, 403 So. 2d 975 (Fla. 1981). Here, however, the state charged **Occhicone** with two counts of premeditated first-degree murder and the court instructed on and the state argued only premeditated murder. HN6 The state need not charge and convict of felony murder or any felony in order for a court to find the aggravating factor of murder committed during the course of a felony. *Ruffin v. State*, 397 So. 2d 277 (**Fla.**), *cert. denied*, 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194 (1981). While the jury should have been told what constitutes burglary, the failure to do so is not fundamental error when there are other valid aggravating circumstances. HN7 The jury does not have to specify what factors it relied on in making its recommendation. Speculating that **Occhicone**'s jury may have relied on one word without knowing its specific legal definition is of no moment here because the judge as the sentencer must make written findings supporting the sentence. We must assume that the instant judge knew the technical definition of burglary, and the facts [5] support his finding the mother's murder to have been committed during a burglary.

We find no merit to the rest of **Occhicone**'s claims. *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), did not make HN8 Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel

unconstitutionally vague. *Brown v. State*, 565 So. 2d 304 (Fla. 1990); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989). We find no support for **Occhicone**'s claim that the prosecutor's cross-examination of witnesses "insinuated" that he had an extensive criminal record. Allowing a deputy to testify about the events leading to **Occhicone**'s prior arrest and conviction of resisting arrest with violence was not error. *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989); *Dufour v. State*, 495 So. 2d 154 (Fla. 1986), *cert. denied*, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); *King v. State*, 436 So. 2d 50 (Fla. 1983), *cert. denied*, 466 U.S. 909, 104 S. Ct. 1690, 80 L. Ed. 2d 163 (1984). The court did not err in allowing lay witnesses to express their opinions as to **Occhicone**'s not being intoxicated when they came into contact with him two to four hours after he committed these murders, especially in light of **Occhicone**'s claiming that he lived in a constant state of intoxication. *See Carroll v. State*, 353 So. 2d 1268 (Fla. 1st DCA 1978). Finally, we do not agree that the trial court impermissibly restricted the presentation of mitigating evidence by refusing to allow the introduction of four photographs of **Occhicone**'s young son. The defense did not pursue the court's invitation to demonstrate the relevance of that many photographs, and, in light of **Occhicone**'s testimony about the child and other witnesses' testimony that he did not treat the child well, we find no violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Therefore, in addition to his convictions we also affirm **Occhicone**'s death sentence.

It is so ordered.

Concur by: GRIMES; KOGAN (In Part)

Concur

[907] GRIMES, J., concurring.

I write only to explain my position with respect to **Occhicone**'s contention that the prosecutor's reference to his refusal to take hand-swab tests was an impermissible comment upon his right against self-incrimination. **Occhicone** refers to *Herring v. State*, 501 So. 2d 19 (Fla. 3d DCA 1986), in which the district court of appeal held that evidence of the defendant's refusal to take such a test which had been admitted to prove consciousness of guilt was reversible error.

Occhicone's contention must fail because the refusal to take the hand-swab test is not protected by the constitutional privilege that no one may be compelled to testify against himself. As noted in *Macias v. State*, 515 So. 2d 206, 208 (Fla. 1987):

> It was testimonial compulsion, rather than every kind of compulsion, for which the privilege was originated. 8 Wigmore, *Evidence,* § 2263 (1961). According to 4 S. Gard, *Jones on Evidence,* § 22:3, at 10 (6th ed. 1972), "the more recent authorities clearly show a tendency to adhere to the Wigmore concept that only oral testimony and the production of documents or other objects by the witness, and acts of an assertive character, are within the privilege." (Footnote omitted.)

Just as he could have been required to submit to fingerprinting, photographing, or blood tests, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), **Occhicone** could have been compelled to undergo the hand-swab test. Having refused to take the test, evidence of this fact was admissible for any relevant purpose. Thus, W. LaFave & J. Israel, *Criminal Procedure* § 7.2(c) (1985), states:

> What happens if a defendant refuses to cooperate in an identification procedure which requires his active participation? One possibility is that the prosecutor may be permitted to comment on the refusal to cooperate. If the identification procedure in which the defendant has refused to participate or cooperate, such as a lineup or taking of exemplars, is not protected by the Fifth Amendment, then of course there is no right to refuse and thus the act of refusal is not itself a compelled communication. Rather, that refusal is considered circumstantial evidence of consciousness of guilt just as is escape from custody, a false alibi, or flight.

(Footnote omitted.)

In *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), the United States Supreme Court considered whether evidence of a defendant's refusal to

submit to a blood-alcohol test offended the right against self-incrimination. The Court held that the refusal to do so after a police officer had lawfully requested it was not an act coerced by the officer and thus not protected by the privilege against self-incrimination. The Court distinguished *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), which had held that a prosecutor could not use the defendant's silence after *Miranda* [6] warnings to impeach his testimony at trial because it was fundamentally unfair to assure a suspect that his silence would not be used against him and thereafter use his silence to impeach an explanation subsequently offered at trial. The Court said that, unlike the instruction in *Doyle,* it was not fundamentally unfair to use Neville's refusal to take the test as evidence of guilt. Even though he was not warned that his refusal could be used against him, Neville had not received any "misleading implicit assurances" as to the consequences of refusing the test. *Neville*, 459 U.S. at 565.

This rationale also explains the distinction between the instant case and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), upon which **Occhicone** also relies. In *Greenfield,* the United States Supreme Court held that the state could not introduce evidence of what the defendant said after receiving *Miranda* warnings in order to prove that he was sane. The Court explained that:

> **[908]** Greenfield received "the sort of implicit promise to forgo use of evidence that would unfairly 'trick' [him] if the evidence were later offered against him at trial." 459 U.S., at 566, 103 S. Ct., at 924.

474 U.S. at 293 (footnote omitted).

Herring is inapplicable, not because the evidence of **Occhicone**'s refusal to take the test was introduced to demonstrate diminished capacity rather than guilt, but because *Herring* is based on an erroneous premise. Unlike the case where *Miranda* warnings are given which advise the defendant that he has the right to refuse to make a statement, **Occhicone** was not told that he could refuse the hand-swab test. There was no misleading assurance. The fact that the police chose not to force him to take the test when he did refuse is irrelevant. Thus, the evidence of **Occhicone**'s refusal was properly admitted and subject to comment by the prosecutor.

Dissent by: KOGAN (In Part)

Dissent

KOGAN, J., concurring in part and dissenting in part.

I concur with the majority's affirmance of the conviction of first-degree murder, but dissent as to the penalty. The trial judge found that the defendant at the time of the commission of the offense was under the influence of an extreme mental or emotional disturbance, that he was a heavy drinker, and an alcoholic who was also experiencing depression. The judge found that this depression and alcoholic condition combined to produce in the defendant an extreme mental or emotional disturbance; that fact, coupled with the bizarre facts of this case, indicate a crime committed by a mentally and emotionally disturbed individual. I can only conclude that death is not proportionate here. *E.g.*, *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988).

Footnotes

1 **Occhicone** had given notice of an intent to rely on insanity as a defense. After the trial started, the plea of not guilty by reason of insanity was supplanted by the claim that he lacked the capacity to form premeditated intent.

2 In *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989), we disallowed using diminished capacity as a defense and held that HN2 evidence of an abnormal mental condition not constituting legal insanity is inadmissible to prove that a defendant could not have formed the specific intent needed to be held responsible for committing a crime. The intoxication defense is still allowed if it can be shown that the defendant is unable to entertain the requisite intent of premeditation. *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984).

3 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

4 The trial court found, in part:

> Statements by the defendant to female bartenders and to William Anderson within weeks of the murders revealed defendant's dislike for [the former girlfriend's] parents and his thoughts of murdering them. He also had expressed the thought of killing [her] parents while [she]

watched, and he made statements to [her] which constituted threats against her relatives.

Defendant possessed a gun and bullets when he presented himself at the home of the murder victims at about 4:00 A.M. on June 10, 1986. He also damaged the telephone line at the residence and made the telephones inoperative before he shot and killed [the victim].

Although there appears to have been no acts or conduct on the part of [the victim] of a provoking or hostile nature, after breaking through a locked door, the defendant shot the victim four times, thereby bringing to fruition the numerous earlier expressed thoughts and threats.

Defendant had contemplated and verbalized this murder for days and weeks prior to June 10, 1986, and heightened premeditation existed when he, in an execution style, and without any pretense of justification, repeatedly shot at close range this unarmed grandmother.

5 After shooting the father, **Occhicone** broke into the house through a locked door and killed the mother.

6 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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Eberhardt v. State

Court of Appeal of Florida, First District

September 26, 1989, Filed

Case No. 88-891

Reporter
550 So. 2d 102; 1989 Fla. App. LEXIS 5458; 14 Fla. L. Weekly 2272

KENNEDY EBERHARDT, Appellant, v. STATE OF FLORIDA, Appellee

Subsequent History: Review Denied February 28, 1990. Reported at: *1990 Fla. LEXIS 329*.

Prior History: [**1] An appeal from the circuit court for Leon County, William L. Gary, Judge.

Core Terms

clothes, intoxication, cross-examination, direct examination, argues, prison, new trial, conversation, venire, burglary, contends, reversal

Case Summary

Procedural Posture

Appellant sought review of a judgment from the Circuit Court for Leon County (Florida), which convicted him following a jury trial of burglary of a structure in violation of *Fla. Stat. ch. 810.02*.

Overview

The court reversed appellant's conviction for burglary of a structure in violation of *Fla. Stat. ch. 810.02*. The owner of the premises found appellant asleep or passed out in an office chair at a desk on Sunday morning with several of the owner's belongings in appellant's pockets. At trial, appellant claimed that he was too intoxicated to form the requisite intent to commit an offense upon entering the building. The court held that several errors deprived appellant of a fair trial. First, the trial court erroneously prevented appellant from eliciting testimony from witnesses on cross-examination that appellant appeared to them to be passed out or in a state of severe intoxication. In particular, a lay witness could testify to physical appearance or observable intoxication. Second, the trial court erred by refusing to give an instruction on voluntary intoxication because the evidence of intoxication was sufficient to warrant such an instruction. Finally, the admission of evidence of a burglary that occurred the night before and for which appellant was not charged was highly prejudicial, and such prejudice manifestly outweighed any probative value of this irrelevant evidence.

Outcome

The court reversed appellant's conviction for burglary of a structure because several errors deprived appellant of a fair trial. The trial court improperly limited cross-examination as to appellant's voluntary intoxication defense, improperly refused to instruct the jury on the defense, and allowed highly prejudicial testimony about another burglary for which appellant was not charged.

Christine Bates

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Criminal Law & Procedure > Trials > Prison Attire & Restraints

HN1 Once a defendant has requested to appear in court in other than prison clothes, the state must make appropriate provisions to this end. However, a defendant desiring to establish that he was prejudiced because forced to stand trial in prison clothing must make a timely objection and establish on the record that he was identified by a juror as being a prisoner by reason of his wearing the prison uniform. When a defendant has so established his objection, prejudice is shown and the defendant is held to be denied a fair trial.

Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

HN2 A lay witness may testify to physical appearance or observable intoxication.

Criminal Law & Procedure > Trials > Direct Examinations

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Defenses > Intoxication

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

HN3 Voluntary intoxication is recognized as a valid defense in Florida to specific intent crimes. A defendant is entitled to a jury instruction when any evidence presented at trial supports his theory of defense, even when such evidence is brought out on cross-examination. The instruction need not be given even though the evidence shows the use of intoxicants if the evidence fails to show intoxication. Although it is not error to refuse to give the instruction on intoxication when there is no evidence as to the amount of intoxicants consumed prior to the commission of a crime and no evidence of intoxication, these two requirements are alternative in nature and not necessarily conjunctive. Evidence of one's condition of intoxication may suffice even though there is no direct evidence of the amount of intoxicants consumed.

Counsel: Michael E. Allen, Public Defender, and Phil Patterson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

Judges: Zehmer, J. Ervin, J., concurs. Wentworth, J., concurs in conclusion.

Opinion by: ZEHMER

Opinion

[*103] Appellant, Kennedy Eberhardt, was charged with unlawfully entering a structure located in Tallahassee on the night of September 20, 1987, with the intent to commit an offense therein, contrary to *section 810.02, Florida Statutes*. Eberhardt pleaded not guilty, was tried, and was adjudicated guilty of burglary of a structure as charged pursuant to the jury verdict. He appeals the judgment on numerous grounds. Because several errors deprived him of a fair trial, we reverse and remand for a new trial.

Briefly stating the context of the case, Douglas Cooksey, the owner of the subject premises, found Eberhardt asleep or passed out in an office chair at a desk on a Sunday morning. Eberhardt's shirt had been taken off and was found in another office. A key to the office, a pocket knife, and a monogrammed [**2] money clip bearing Cooksey's name, all normally kept in his desk drawer, were found in Eberhardt's pockets. Whether Eberhardt was merely asleep or passed out due to overindulgence of alcohol or drugs and unable to form the requisite intent to commit an offense upon entering the building was critical to the defense at trial.

I.

We first address the defendant's argument that the trial court erred in denying his motion for a new trial because he was brought in prison clothing before the venire. It appears that prior to jury selection and while clad in readily recognizable jail clothes, Eberhardt was brought into the courtroom and apparently observed by the venire. At that point defense counsel moved without success for a continuance so that a jury could be chosen from a venire that had not observed appellant so dressed. Before sentencing, counsel moved unsuccessfully for a new trial on the same ground.

[*104] Eberhardt had requested that the state allow him to dress for trial in normal clothing. His family were supposed to bring clothes to the jail before the trial, but they did not arrive in time, and he was moved to the courtroom in jail clothes. Shortly thereafter Eberhardt's family arrived [**3] with his clothes and he changed clothes prior to the jury panel's being seated in the jury box and examined on voir dire. Citing *Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126, reh'g denied 426 U.S. 954, 49* l.ed. wd 1193, *96 S. Ct. 318 (1976)*, Eberhardt argues that it was reversible error for the state and the court to compel him to appear before the venire in jail clothes rather than to provide him with appropriate clothing, even though his family failed to timely arrive, and that the court proceedings should have been delayed temporarily to provide him with appropriate clothing.

The state argues that no violation of *Estelle* occurred because the failure of Eberhardt's family to bring his clothes in a timely manner was not the fault of the state; and furthermore, when the voir dire of the jury took place, defendant was dressed in the clothes they had brought. Therefore, the state argues, any problem with Eberhardt's dress in the courtroom was his own fault and is a matter concerning which he should not be heard to complain. The state further contends that Eberhardt has failed to demonstrate prejudice and preserve this issue for appellate review because he is required by law to show [**4] affirmatively on the record that the venire actually saw the prison clothes and that the viewing was more than incidental and resulted in prejudicial identification. The state cites, in support of this contention, *Maxwell v. Wainwright, 490 So. 2d 927* (Fla.), *cert. denied 479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986)*; *Elledge v. State, 408 So. 2d 1021 (Fla. 1981)*, *cert. denied 459 U.S. 981, 103 S. Ct. 316, 74 L. Ed. 2d 293 (1982)*, *reh'g denied 459 U.S. 1137, 103 S. Ct. 771, 74 L. Ed. 2d 984 (1983)*; and *Gates v. Zant, 863 F.2d 1492* (11th Cir.), *reh'g denied 880 F.2d 293 (1989)*. Pointing out that Eberhardt's counsel did not ask any potential juror whether he or she saw the defendant in prison clothes and failed to establish the requisite prejudice, the state argues it would be pure speculation to conclude that the defendant was prejudiced within the meaning of *Estelle*.

The law now recognizes that ***HN1*** once the defendant has requested to appear in court in other than prison clothes, the state must make appropriate provisions to this end. We conclude that even though Eberhardt had asked his family to bring the necessary clothing, the state was not necessarily [**5] relieved of its obligation by the family's undertaking should the clothing not arrive on a timely basis. However, a defendant desiring to establish that he was prejudiced because forced to stand trial in prison clothing must make a timely objection and establish on the record that he was identified by a juror as being a prisoner by reason of his wearing the prison uniform. *Torres-Arboledo v. State, 524 So. 2d 403* (Fla.), *cert. denied 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 239 (1988)*. Although Eberhardt's counsel made a timely objection, counsel did not thereafter question the jury to establish on the record that at least one member saw him so attired and recognized his status as a prisoner. Nor did she undertake to challenge any of the jurors for cause on this ground. Where a defendant has so established his objection, prejudice is shown and the defendant is held to be denied a fair trial. Although we conclude that it was error for the court to permit the venire to see Eberhardt in the courtroom in prison clothes, defense counsel did not

properly preserve this objection as a basis for reversal. See *Torres-Arboledo v. State, supra; Hildwin v. State*, 531 So. [**6] 2d 124 (Fla. 1988), *aff'd* 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728, *reh'g denied*, 492 U.S. 927, 106 L. Ed. 2d 612, 109 S. Ct. 3268 (1989).

II.

Eberhardt next contends that he was erroneously prevented from adducing evidence establishing that he was too intoxicated and "high" on drugs to form the requisite criminal intent to commit an offense upon entering the building. He argues [*105] that he was denied due process of law and the assistance of counsel because counsel was prohibited from eliciting testimony from witnesses that Eberhardt appeared to them to be passed out; that is, in a state or condition of severe intoxication.

On direct examination by the prosecutor, two witnesses testified that the defendant was found asleep in a desk chair. On cross-examination, counsel for defendant was prohibited from asking whether the defendant appeared to be under the influence of drugs or alcohol. ***HN2*** A lay witness may testify to physical appearance or observable intoxication. Ehrhardt, *Florida Evidence* § 701.1, n. 18 (2d ed. 1984). The questions on cross-examination did not go beyond the scope of the questions asked on direct examination. Once the state asked about the defendant's condition and appearance [**7] when found in the building, the defense had a right to question and explore all the facts relevant to defendant's state or condition, including intoxication, when discovered there. *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982). One of the fundamental purposes of cross-examination is to test, weaken, or demonstrate the impossibility of the testimony on direct examination, and the scope of cross-examination cannot be unduly limited so as to prevent counsel from carrying out this purpose.

Moreover, Eberhardt contends that the trial court reversibly erred in not allowing his counsel to cross-examine Officer Glisson regarding all the statements Eberhardt made to him after arrest. The following question was asked on cross-examination by the defense counsel:

> Q. Mr. Poitinger asked you what the Defendant said about the shirt. What else did Mr. Eberhardt tell you?
>
> MR. POITINGER: Your Honor, I'm going to object. Can we approach the bench?

(R. 164). The state's objection was sustained. Despite the state's argument that the officer was being asked to recite conversations other than the one he mentioned on direct examination that involved exculpatory statements, that is not manifest [**8] from this question and no proffer of the answer from the witness was made. Once direct testimony of a conversation between Glisson and defendant had been admitted, the defense became entitled to cross-examine the witness concerning the whole of the conversation. *Guerrerro v. State*, 532 So. 2d 75, 77 (Fla. 3d DCA 1988). Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. Ehrhardt, *Florida Evidence*, § 108.1 (2d Ed. 1984). Once the officer testified in the state's case-in-chief about one portion of Eberhardt's statements to him, the court erred in sustaining the state's hearsay objection for the reason that his statements he was "high" or intoxicated were self serving. *Heathcoat v. State*, 430 So. 2d 945 (Fla. 2d DCA), *aff'd*, 442 So. 2d 955 (Fla. 1983).

III.

Defendant next contends that the trial court erred in failing to instruct the jury on his defense of voluntary intoxication [**9] as requested. ***HN3*** Voluntary intoxication is recognized as a valid defense in Florida to specific intent crimes. *Linehan v. State*, 476 So. 2d 1262, 1264 (Fla. 1985). A defendant is entitled to a jury instruction where *any* evidence presented at trial supports his theory of defense, even where such evidence is brought out on cross-examination. *Gardner v. State*, 480 So. 2d 91, 92-3 (Fla. 1985). The instruction need not be given even though the evidence shows the use of intoxicants if the evidence fails to show intoxication. *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988).

Although the evidence of intoxication in this case was marginal, we conclude that it was sufficient to warrant such an instruction. The building owner, Cooksey, testified on cross-examination that it was his impression upon seeing defendant that he was passed out. Officer Whaley testified on direct examination that, upon [*106] being awakened in the office, defendant appeared spaced out. His proffered, but excluded, testimony was that defendant had told him he "was high and needed a place to crash." Although it is not error to refuse to give the instruction on intoxication where there is no evidence as to the amount of intoxicants [**10] consumed prior to the commission of a crime *and* no evidence of intoxication, *Gardner v. State, 480 So. 2d 91 (Fla. 1985)*; *Jacobs v. State, 396 So. 2d 1113* (Fla.), *cert. denied*, *454 U.S. 933, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981)*, these two requirements are alternative in nature and not necessarily conjunctive. Evidence of one's condition of intoxication may suffice even though there is no direct evidence of the amount of intoxicants consumed. We conclude that the evidence of defendant's intoxication, including that which should have been admitted had the testimony on cross-examination been allowed, was sufficient to warrant instructing the jury on this defense. *See* Heathcoat, 430 So. 2d 945; *Mellins v. State, 395 So. 2d 1207* (Fla. 4th DCA), *rev. denied*, *402 So. 2d 613 (Fla. 1981)*.

IV.

Eberhardt next objects to the testimony admitted at trial proving a burglary of the same premises on September 19, 1987, the night before the crime charged against him, contending that this evidence improperly linked him to that earlier, uncharged crime. On direct examination, the owner of the business was questioned by the prosecutor as follows:

> Q. All right, sir. Now [**11] I'm going to call your attention to the date on or about the 20th of September, 1987. Did you have an occasion to go to your place of business and find anything unusual?
>
> A. Yes, sir.
>
> Q. Okay. If you will, what did you find when you went -- first of all, why did you go there?
>
> A. I had been notified the day before --
>
> MS. WILLIAMS: Your Honor, I object. . . .

The objection was overruled, and in response to the prosecutor's questions, Mr. Cooksey described the burglary of the premises the night before defendant entered it. But the reason *why* Mr. Cooksey happened to go to his own place of business on a Sunday morning was simply not a material fact in issue. The testimony was, therefore, not relevant to the state's case, and the court erred in overruling the objection. The admission of evidence of a burglary that occurred the night before Eberhardt was involved and for which he was not charged was highly prejudicial, and such prejudice manifestly outweighed any probative value of this irrelevant evidence.

V.

Finally, Eberhardt complains that deliberate prosecutorial overreaching during final argument was fundamental error and denied him a fair trial. The argument complained [**12] of is as follows:

> PROSECUTOR: If you believe that somehow we are to excuse and justify this defendant because allegedly he was loaded, what does that do to our property rights? Does that mean that my house, her home, his place of business can be violated by anybody as long as they are drunk or under the influence of drugs? Welcome, drunks, come into my house? Wrong. I don't think that our founding fathers ever intended that to be the law in this country and I anticipate that your verdict is going to confirm what I think, and that we are not going to allow this defendant, just because he claims through counsel that he was so loaded he didn't know what he was doing, that we are going to excuse that somehow. Now, how many times have we heard the old adage, "The devil made me do it" or "Wine made me do it". . . . The problem with that is right here between our ears. It's called a brain. Because of this brain, I'm able to determine for myself whether I should do something and the consequences of doing it. And I submit to you that it's time

> for this jury with its verdict to deliver a message to Mr. Eberhardt, use your head, don't commit any more crimes, because, as I asked you initially, [**13] this case is deserving of a verdict that [*107] speaks the truth. And that verdict is guilty of burglary of a structure as charged.

(R. 200-201).

This argument was highly improper in at least two respects. The argument misstated the law of the defense of intoxication and intentionally misled the jury by imploring them to believe "that our founding fathers never intended that to be the law in this country. . . ." This amounts to an overt appeal to the jury's sympathy and borders on a "golden rule" argument. The reference to Eberhardt's claim of intoxication "through counsel" amounts to a comment on his failure to take the stand and testify to the facts himself, in derogation of the defendant's right to remain silent. Such argument is erroneous and may be grounds in itself for a new trial. *See, e.g., Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987).*

The state argues that no objection was made and no curative instruction or motion for mistrial was made by defense counsel, and therefore the error has not been properly preserved for appellate review and a ground for reversal. Eberhardt argues that the argument was so overreaching [**14] that it amounted to fundamental error. We need not reach that question, however, because reversal for a new trial is required on other grounds. We are confident that upon retrial the argument of counsel for the state will comport with the requirements of the law and professional standards.

REVERSED AND REMANDED FOR NEW TRIAL.

Ervin, J., concurs.

Wentworth, J., concurs in conclusion.

Caution
As of: February 17, 2015 11:33 AM EST

Azile v. King Motor Ctr., Inc.

Court of Appeal of Florida, Fourth District

January 6, 1982

No. 80-1956

Reporter
407 So. 2d 1096; 1982 Fla. App. LEXIS 18857

LOUISE ST. AZILE, Appellant, v. KING MOTOR CENTER, INC., and VERNON WOODROW SJODIN, Appellees

Prior History: [**1] Appeal from the Circuit Court for Broward County; George Richardson, Jr., Judge.

Core Terms

deposition, appellees, witness's, new trial, cross-examination

Case Summary

Procedural Posture

Appellant automobile passenger sought review of the final judgment of the Circuit Court for Broward County (Florida), which denied her motion for new trial, in an action against appellees, corporation and driver, arising out an automobile accident involving appellant and appellee driver.

Overview

Appellant automobile passenger brought an claim against appellees, corporation and driver, for injuries she sustained in an automobile accident with appellee driver. During appellant's direct examination of a witness, appellees' counsel rose in the presence of the jury and accused the witness of perjury. Appellant requested a mistrial. The trial court gave each juror a copy of the witness's deposition testimony to read during recess. The jury found for appellees, and the trial court denied appellant's motion for a new trial. The court reversed, holding that the trial court abused its discretion in denying appellant a mistrial, finding that the statements of appellees' counsel in front of the jury were improper and prejudicial. The court found that the prejudice to the witness's credibility was compounded by the use of the deposition, which was improper because it denied appellant the right to object to any portion of the deposition. The court ruled that depositions were required be read to the jury pursuant to *Fla. R. Civ. P. 1.330(b)*, and appellees failed to follow the proper procedures for impeaching a witness by use of prior inconsistent statements.

Outcome

The court reversed and remanded for a new trial, because statements made by counsel for appellees, corporation and driver, in front of the jury, accusing a witness of perjury, were improper and prejudicial. The court found that the trial court erred by allowing the jurors to read the witness's deposition testimony because depositions were to be read to the jury and the proper procedures for impeaching a witness were not followed.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Trials > Motions for Mistrial

Christine Bates

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1 A motion for mistrial is directed to the sound judicial discretion of the trial judge.

Civil Procedure > Trials > Evidence & Testimony > Depositions

HN2 The clear import of Fla. R. Civ. P. 1.330(b) is that depositions must be read to the jury. This rule concerns objections to admissibility of depositions and states that, subject to the provisions of Rule 1.300(b) and Fla. R. Civ. P. 1.330(d)(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part of it for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

HN3 There are established procedures governing the impeachment of witnesses by use of prior inconsistent statements. A predicate must first be established by calling the attention of the witness to be impeached to the allegedly contradictory statements and to the occasion when it is alleged said statements were made. In addition, opportunity must be given the witness to examine, explain, confess, or deny such contradictory statements.

Counsel: Charles R. Mindlin of Law Offices of Philip A. Brooks, Miami Beach, for appellant.

D. Patrick Winburn of Thomas T. Grimmett, P. A., Fort Lauderdale, for appellees.

Judges: Before BERANEK, J. GLICKSTEIN and HURLEY, JJ., concur.

Opinion by: BERANEK

Opinion

[*1097] BERANEK, Judge.

Louise St. Azile appeals an adverse final judgment asserting error in trial and in the denial of her motion for new trial. On July 25, 1978, the appellant was a passenger in a car being driven by Dieuseul Louis which was involved in an accident with a van driven by Vernon Sjodin and owned by King Motor Center, Inc. The accident occurred in Broward County on I-95 heading north when Sjodin changed lanes in front of Louis' car causing Louis to swerve in order to avoid hitting the van. Louis lost control, crossed the median strip, and collided with cars heading south. The appellant sued Sjodin and King Motor Center seeking compensation for her injuries. The appellees filed a third party complaint for indemnification against Louis.

As part of her case in chief, the appellant called Mr. Louis as a witness. Louis, who had previously [**2] been deposed, did not testify in accordance with his deposition. Rather than waiting for cross-examination, appellees' counsel rose in the presence of the jury and stated: "... I'd like this witness advised of perjury at this time. I have a sworn statement to the contrary.... I'd like the State's Attorney brought in here. This is out and out flagrant change of his prior testimony." The appellant made a motion for a mistrial upon which the court never ruled. When it came time for cross-examination, the appellee asked to offer Mr. Louis' deposition in lieu of cross-examination declaring in front of the jury: "I'm so hot because I think this man is lying." The appellant did not object to use of the deposition but rather than normal cross-examination or reading the deposition to the jury, the court, after much discussion, allowed appellees to give each juror a copy to read at his leisure. The appellant strenuously objected on the grounds that the deposition was testimony, not documentary evidence, and that more emphasis would be placed

on this evidence than on any other witness's testimony. The court overruled the objection and allowed each juror to read the deposition during a [**3] recess. The jury found for the appellees and the court denied the appellant's motion for a new trial.

The appellant raises three points on appeal, two of which are meritorious. First, the appellant contends that the trial court erred in denying her motion for a new trial which was based in part on the court's denial of a mistrial following the remarks made by appellees' counsel. ***HN1*** A motion for mistrial is directed to the sound judicial discretion of the trial judge. *Compania Dominicana de Aviacion v. Knapp, 251 So.2d 18 (Fla. 3d DCA 1971)*. We believe the trial court abused his discretion in this matter. It is clear that appellees' counsel was grandstanding in a totally improper fashion. The court in *Moore v. State, 102 Fla. 1135, 136 So. 888 (1931)*, made the following remarks concerning the conduct expected of a state prosecutor:

> This court has several times held that a state attorney occupies a quasi judicial position, and should conduct the case for the state with perfect fairness to the defendant. He should not unnecessarily take any action in the presence of the jury calculated to prejudice the jury against the defendant or any witness for the defendant, though it is [**4] perfectly permissible for him by skillful cross-examination or the introduction of other evidence to reveal either mistakes or falsehoods in the testimony of the defendant's witnesses pertaining to matters material to the issues. If it develops in the trial of a criminal case that a witness has perjured himself and deserves to be arrested and prosecuted, the state's attorney can very easily refrain from taking any immediate action in the presence of the jury during the trial of the case, as he can effectively handle the situation in other ways without prejudice to the case then on trial.

Obviously the considerations are slightly different in a civil case but every lawyer, as an officer of the court, has a duty of basic fairness. To accuse a witness of lying, demand a warning as to perjury, and request [*1098] the state attorney be brought in, all in the presence of the jury is totally improper. *Hernandez v. State*, 156 Fla. 356, 22 So.2d 781 (1945). It is inconceivable to us that the jury in this case was not prejudiced by counsel's remarks. This is particularly true in light of the further improper use of the witness's deposition as bearing upon his credibility.

The appellant's [**5] second point concerns use of the deposition. Appellees argue that appellant made no objection to introducing the deposition. However, it was not the introduction but the manner in which it was introduced and used to which the appellant objected. It is clear from the record that counsel strenuously objected to giving copies to the jurors. The appellant correctly argued at trial that the deposition was testimony, not documentary evidence. Furthermore, ***HN2*** the clear import of *Fla.R.Civ.P. 1.330(b)* is that depositions must be read to the jury. This rule concerns objections to admissibility of depositions and states:

> (b) Objections to Admissibility. Subject to the provisions of Rule 1.300(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part of it for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

By allowing each juror to read the deposition in its entirety, appellant's right to object to any portion was foreclosed. *See Schoeppl v. Okolowitz, 133 So.2d 124 (Fla. 3d DCA 1961)*. Further ***HN3*** there are established procedures governing the impeachment [**6] of witnesses by use of prior inconsistent statements. A predicate must first be established by calling the attention of the witness to be impeached to the allegedly contradictory statements and to the occasion when it is alleged said statements were made. In addition, opportunity must be given the witness to examine, explain, confess, or deny such contradictory statements. *Garcia v. State, 351 So.2d 1098 (Fla. 3d DCA 1977)*. These procedures were not followed in this case.

We conclude the result of the above errors requires reversal and a new trial. Counsel initially made grossly improper statements before the jury as to the witness's credibility and thereafter compounded the prejudice by

improper use of the witness's [1] deposition bearing upon the same credibility issue. The cause is reversed and remanded for a new trial.

[**7] REVERSED AND REMANDED.

GLICKSTEIN and HURLEY, JJ., concur.

[1] Although the witness was also a party there is no contention that the deposition was being used for anything other than impeachment by demonstration of a prior inconsistent statement.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

NOTES

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick §168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*

For similar rules see Uniform Rule 54; California Evidence Code §1155; Kansas Code of Civil Procedure §60–454; New Jersey Evidence Rule 54.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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Citation: 72 So. 2d 391

*72 So. 2d 391, *; 1954 Fla. LEXIS 1416, ***

DANIEL v. ROGERS

[NO DOCKET NUMBER]

SUPREME COURT OF FLORIDA, Division A

72 So. 2d 391; 1954 Fla. LEXIS 1416

May 7, 1954

COUNSEL: **[**1]** C. L. Chancey, Fort Lauderdale, and Macfarlane, Ferguson, Allison & Kelly, Tampa, for appellants.

Fleming, O'Bryan & Fleming, Fort Lauderdale, for appellee.

JUDGES: MILLEDGE, Associate Justice, ROBERTS, C.J., and TERRELL and MATHEWS, JJ., concur.

OPINION BY: MILLEDGE

OPINION

[*391] MILLEDGE, Associate Justice.

This appeal is from a judgment based on a jury verdict of $35,000 for damages sustained in an automobile collision. The credibility of witnesses and the weight of the evidence are jury questions. The evidence is ample to support the verdict. The appellants complain that counsel were limited to 45 minutes each in final argument to the jury. The is a matter within the discretion of the trial judge, and he did not abuse his discretion. The trial judge is to be commended for exercising a firm control of the trial.

The only question presented which merits even a brief discussion concerns insurance. Apparently the defendants carried no insurance and they tried at several points to present this to the jury beginning with questions on the voir dire. The trial judge consistently refused to permit this. Several of the refused requested charges told the jury that the question **[**2]** of insurance was irrelevant and should be disregarded. In other words, the defendants' counsel recognized that the subject of insurance was irrelevant. He wished to set up a straw man and then knock him down. The trial judge was right in excluding this irrelevancy from the beginning. The reason the subject is worth mentioning at all is to point out that this case decides no more than the facts justify -- that to exclude as irrelevant the fact of the non-existence of insurance is not error. Whether it is error and, if so, **[*392]** under what circumstances, to permit a defendant to show that he is not indemnified by insurance, is not here decided.

Affirmed.

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Citation: 79 so. 3d 755

*79 So. 3d 755, *; 2011 Fla. App. LEXIS 18090, **;*
36 Fla. L. Weekly D 2503

FRANK SPECIAL, as Personal Representative of the Estate of Susan Special, Appellant, v. IVO BAUX, M.D., IVO BAUX, M.D., P.A. PINNACLE ANESTHESIA, P.L.; and WEST BOCA MEDICAL CENTER, INC., Appellees.

No. 4D08-2511

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

79 So. 3d 755; 2011 Fla. App. LEXIS 18090; 36 Fla. L. Weekly D 2503

November 16, 2011, Decided

SUBSEQUENT HISTORY: As Corrected November 23, 2011
Appeal granted by Special v. West Boca Med. Ctr., 90 So. 3d 273, 2012 Fla. LEXIS 1255 (Fla., 2012)
Reversed by, Remanded by, Certified question answered by Special v. W. Boca Med. Ctr., 2014 Fla. LEXIS 3320 (Fla., Nov. 13, 2014)

PRIOR HISTORY: [1]**
Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502005CA00 2533XXXXMB.
Special v. Baux, 52 So. 3d 682, 2010 Fla. App. LEXIS 9114 (Fla. Dist. Ct. App. 4th Dist., 2010)

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, the personal representative of a deceased patient's estate, brought a negligence action against defendants, an anesthesiologist, his related corporations, and a hospital. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County (Florida), found for the anesthesiologist, the hospital, and the corporations. The personal representative appealed.

OVERVIEW: The personal representative claimed that the anesthesiologist and the hospital were negligent in administering anesthesia and in responding to the decedent's cardiopulmonary arrests. The doctors contended instead that the death was caused by amniotic fluid embolus, an allergic reaction from a mother's blood mixing with amniotic fluid. The trial court erroneously limited the personal representative's cross-examination of a defense expert's credibility regarding the proof of the cause of death. The evidence was relevant under § 90.401, Fla. Stat. (2009), because it was central to the truth seeking function of the trial, and under § 90.608(5), Fla. Stat. (2009), the personal representative should have been allowed to attack the witness' credibility by contradictory proof by another witness. In determining whether the error was harmless, the appellate court receded from a line of cases that applied a strict, outcome-determinative "but-for" test for harmless error, and applied an "effect on the fact finder" error analysis under § 59.041, Fla. Stat. (2009). It also certified the

question to the Florida Supreme Court. Ultimately, the appellate court determined that the error was harmless.

OUTCOME: The court affirmed the judgment.

CORE TERMS: harmless error, civil cases, harmless error, miscarriage of justice, harmless, trier of fact, reversal, criminal cases, fact finder, new trial, probability, contributed, cross-examination, harmful, diagnosis, but-for, harmless error rule, new trials, oriented, majority opinion, collateral source, jury's verdict, entire record, reasonable possibility, burden of persuasion, plain language, beneficiary, finality, fluid, stringent

LEXISNEXIS® HEADNOTES Hide

Evidence > Testimony > Credibility > Impeachment > Contradiction

Evidence > Testimony > Credibility > One's Own Witnesses > Limitations

HN1 In the field of evidence, another use of the term "collateral" concerns the ability to offer extrinsic evidence to contradict a witness's answer to a question posed on cross examination. It is improper to litigate purely collateral matters solely for the purpose of impeaching a party or witness. Once a question is put to the party or witness on a purely collateral matter for the purposes of impeachment, the proponent of the question is bound by the witness's answer; it is inappropriate to then try the truth or falsity of the answer on the collateral matter by adducing independent proof through other witnesses. More Like This Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Relevant Evidence

HN2 Three sections of the evidence code provide the framework for evaluating questions of relevance. The general rule is that all relevant evidence is admissible, except as provided by law. § 90.402, Fla. Stat. (2009). Relevant evidence is defined as evidence tending to prove or disprove a material fact. § 90.401, Fla. Stat. (2009). Section 90.403, Fla. Stat. (2009), establishes a limitation on the introduction of relevant evidence: Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. More Like This Headnote

Evidence > Relevance > Relevant Evidence

Evidence > Testimony > Credibility > Impeachment > Contradiction

HN3 When, on cross-examination, a piece of evidence is offered to attack the credibility of a witness on a material issue, such evidence is relevant under § 90.401, Fla. Stat. (2009), because credibility is central to the truth seeking function of a trial. Under § 90.608(5), Fla. Stat. (2009), any party may attack the credibility of a witness by proof by other witnesses that material facts are not as testified to by the witness being impeached. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Relevance > Relevant Evidence

Evidence > Testimony > Credibility > Impeachment > Contradiction

Torts > Malpractice & Professional Liability > Healthcare Providers

HN4 Where a diagnosis is one of exclusion, the frequency with which one comes to that conclusion is a material fact bearing upon the credibility of the diagnosis. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence > Testimony > Credibility > Impeachment > Contradiction

HN5 Section 90.403, Fla. Stat. (2009), is not a general grant of authority to trial judges to bar evidence adversely impacting a party's position at trial; rather the concept of unfair prejudice pertains to evidence which is directed to an improper purpose, such as evidence that inflames the jury or appeals improperly to the jury's emotions. Unfair prejudice within the meaning of § 90.403 does not arise from relevant inquiries directed at experts offering contrary opinions relevant to a material issue at trial. More Like This Headnote

Civil Procedure > Appeals > Reviewability > Preservation for Review

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > Appeals > Standards of Review > Plain Error > Miscarriages of Justice

HN6 In addition to § 59.041, , Fla. Stat. (2009), § 90.104, Fla. Stat. (2009), provides that a court may reverse a judgment or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and the point is properly preserved in the trial court. The primary contribution of the statute to the law is its requirement of preservation. Section 90.104 adds little to harmless error analysis; if admitted or excluded evidence does not adversely affect a substantial right of a party, its admission cannot be a miscarriage of justice under § 59.041. Nonetheless, some cases involving evidentiary errors apply a harmless error test based on injury to substantial rights. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN7 According to the orthodox English rule, an error in admitting or rejecting evidence is not a sufficient ground for a new trial unless it appears, looking at all the evidence, that the truth has thereby not been reached. In contrast, under the more stringent Exchequer rule, which took hold in English and in many American courts after the 1830s, an error at trial creates per se a right to reversal. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN8 See § 59.041, Fla. Stat. (2010).

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Governments > Legislation > Interpretation

HN9 First, the harmless error statute, § 59.041, Fla. Stat. (2010), applies in both civil and criminal cases. Second, the trigger for reversible error is the occurrence of a miscarriage of justice; how the courts define this term determines the scope of the statute's application. The statute adds the last sentence: This section shall be liberally construed. While a strict construction of a statute would consider only the literal words of the writing, a liberal construction is an interpretation that applies a writing in light of the situation presented and that tends to effectuate the spirit and

purpose of the writing. The purpose of the harmless error statute is to enhance finality by limiting the granting of new trials. However, by insisting on a liberal construction, the statute allows for discretion and flexibility in its interpretation; the term "miscarriage of justice" should not be construed so narrowly that reversal is a rarity. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN10 The Florida Supreme Court used two tests to define a miscarriage of justice giving rise to a reversible error: a but-for, correct result, test that is oriented on the outcome, and the more forgiving effect on the fact finder test that is oriented on the process. A correct result approach asks whether, despite the error, the trial court reached the correct result. It assumes that when the result was correct, there cannot have been a miscarriage of justice. The question is, would the result have been the same without the error. Or, but for the error, would the result have been different. An effect on the fact finder approach, on the other hand, asks whether the error influenced the trier of fact and contributed to the judgment, not just whether it changed the result. Looking at the record as a whole, did the error mislead the trier of fact. The former approach effectively narrows the class of cases that can be reversed; the latter broadens it. The most commonly used test, the but-for formulation, focused on whether the result of the trial would have been different but for the error. This outcome oriented approach considers whether the wrong result was reached as a result of the error. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN11 State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is the touchstone for harmless error analysis in Florida. In it, the Supreme Court firmly establishes an effect on the fact finder harmless error test for criminal cases. The harmless error test places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. This effect on the fact finder test focuses on the likelihood that an error at trial influenced the trier of fact and contributed to the judgment. If it is reasonably possible that the error contributed to the verdict, then the verdict must be set aside, even when, in the reviewing judge's opinion, the verdict would have been the same without the error. The error and its probable effects must be evaluated in light of the other evidence: Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN12 Applying the harmless error test is not simply a matter of reviewing the evidence left untainted by error to determine whether it is sufficient to support the judgment. Instead, the appellate court places the error in the context of the other evidence to estimate the effect of the error on the trier of fact. The purpose of the analysis, in other words, is not to retry the case without the error, but to reconstruct the original trial to determine what role, if any, the error played in the judgment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN13 In a harmless error analysis, the test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a

clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. Thus, even abundant evidence in support of a verdict will not prevent reversal when the appellate court cannot say, after reviewing the whole record, that there is no reasonable possibility that the error affected the verdict. The burden to show that the error was harmless must remain on the State. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN14 The differences between a correct result test and an effect on the fact finder test are subtle but important. An effect on the fact finder test asks the appellate judge to look closely at the error and estimate its effect on the trier of fact. A correct result test asks the judge to look at everything but the error and determine whether the verdict in a trial without it would have been different. In short, one test focuses on process; the other on the end result. Moreover, a correct result, or but-for, test asks the judge to exclude the wrongly admitted evidence (or include the wrongly rejected evidence) and weigh the evidence anew—precisely what the effect on the fact finder test forbids. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN15 The Florida Supreme Court utilizes an effect on the fact finder test for harmless error in civil cases, even though it has not explicitly declared so. The court has expressly declared that on appeal the burden of proving the harmlessness of an error is on the beneficiary of the error in the trial court, who improperly introduced the offending evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN16 A reasonableness standard is inappropriate for a harmless error analytical framework because it does not specify a degree of probability: The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion. Discretion is at least under better control within tests that focus on the degree of probability as more probable than not, highly probable, or almost certain. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN17 Harmless error occurs in a civil case when it is more likely than not that the error did not contribute to the judgment. To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Philip M. Burlington and Andrew A. Harris of Burlington & Rockenbach, P.A., West Palm Beach, and Gary M. Cohen and Andrew B. Yaffa of Grossman Roth, P.A., Boca Raton, for appellant.

Irene Porter and Kathryn L.S. Griswold of Hicks Porter Ebenfeld & Stein, P.A., Miami, and

Eugene Ciotoli of Bobo Ciotoli Bocchino Newman Corsini White & Buigas, P.A., North Palm Beach, for appellees Ivo Baux, M.D., Ivo Baux, M.D., P.A., and Pinnacle Anesthesia, P.L.

Michael K. Mittelmark and K. Calvin Asrani of Michaud Mittelmark Antonacci & Marowitz P.A., Boca Raton, for West Boca Medical Center, Inc.

JUDGES: GROSS, J. MAY, C.J., WARNER, POLEN, STEVENSON, TAYLOR, and CIKLIN, JJ., concur. DAMOORGIAN, J., concurs specially with opinion, in which MAY, C.J., concurs. CONNER, J., concurs in majority opinion only in result and specially with opinion, in which LEVINE, J., concurs. HAZOURI and GERBER, JJ., recused.

OPINION BY: GROSS

OPINION

[*757] CORRECTED OPINION

En Banc

GROSS, J.

Frank Special, as the personal representative of his wife's estate, appeals a final judgment in favor of the defendants below, Dr. Ivo Baux, his related **[**2]** corporations, and West Boca Medical Center, Inc. Special raises three claims. We affirm on all three, but write to discuss Special's contention that the trial court erred in limiting the cross-examination of one of the defendants' expert witnesses.

In considering that issue, we take up this case *en banc* to reconsider other decisions of this court describing the harmless error test in civil cases. We hold that our cases using an outcome determinative, "but-for" test for harmless error are contrary to the Florida Supreme Court's interpretation of the harmless error statute. We recede from those cases and adopt the following standard for harmless error in civil cases: To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict. Applying this test, we find that harmless error occurred in the trial court and affirm the judgment.

Facts

Susan Special became pregnant at age 38. Five weeks before her due date, she underwent a cesarean delivery. She was wheeled into the operating room at the Center's labor and delivery suite. Dr. Baux, the anesthesiologist, **[**3]** administered spinal anesthesia. A moment after the placenta was removed, Susan became unresponsive, her blood pressure fell precipitately, and she went into cardiopulmonary arrest. Dr. Baux and hospital staff attempted to revive her. She was temporarily resuscitated and transferred to the Intensive Care Unit, where another cardiopulmonary arrest occurred. Susan died five hours after the delivery.

Susan's estate sued the defendants for negligence. The claim was that Dr. Baux and the hospital were negligent in administering anesthesia, in monitoring her system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests. The defendants denied the allegations; they alleged instead that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from a mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse.

At trial, the plaintiff's expert testified that Susan died because of the departures from the requisite standard of care. The AFE diagnosis figured prominently. Most notably, the plaintiff called Dr. Barbara Wolf, the chief medical examiner of Palm Beach County at the time of Susan's death. Dr. Wolf conducted **[**4]** the autopsy on Susan and concluded that there was no

evidence of AFE in her body. She explained that in a majority of cases where someone dies from AFE, the autopsy provides evidence of AFE, and that was not the case with Susan.

Special also presented the testimony of Dr. Mark Adelman, a pulmonary specialist, who was called in when Susan went into distress. He diagnosed AFE at the time based upon her clinical signs. Special asked him about the number of patients diagnosed with AFE at West Boca. He testified that he saw all such patients. He estimated that he saw about one or two cases per year at the center. During his testimony, Special was able to elicit national statistics showing incidence of AFE diagnosis at West Boca was about 15 times the rate elsewhere. Dr. Adelman, however, contended in his answers that he was only estimating the number of cases he **[*758]** saw and had no medical records to back up his recollection.

The defendants called Dr. Gary Dildy as their expert. Dr. Dildy opined that Susan died of AFE. He based this on his analysis of the medical records and tests. He explained that AFE is a diagnosis of exclusion. In other words, a doctor will look at all the circumstances and **[**5]** test results to determine likely causes for the patient's condition. Where no other circumstances account for the patient's distress during or after a delivery, a diagnosis of AFE can result.

On cross-examination, the plaintiff elicited from Dr. Dildy that the probability of AFE is approximately 1 in 20,000 births, but can range between 1 in 8,000 and 1 in 80,000. The plaintiff then tried to begin a line of cross-examination of Dr. Dildy about the reliability of the Adelman diagnosis that AFE had actually occurred in Susan, in light of the unusually high incidence of it at the hospital. The defendants' objection on relevancy grounds was sustained.

Special responded that this line of questioning was sought to impeach Dr. Adelman's testimony. The trial court sustained the objection, noting that the plaintiff could inquire about the statistical occurrence of AFE and make argument about disproportionate diagnoses in closing, but could not question Dr. Dildy using the substance of Dr. Adelman's testimony and its reliability to explore the trustworthiness of the AFE diagnosis. The court concluded that doing so would amount to improper collateral impeachment. We understand the trial court's **[**6]** characterization of the proposed impeachment as "collateral" as being merely another way of saying that the line of questioning was irrelevant.[1]

FOOTNOTES

1 HN1 In the field of evidence, another use of the term "collateral" concerns the ability to offer extrinsic evidence to contradict a witness's answer to a question posed on cross examination. As the first district observed in *Faucher v. R.C.F. Developers*, 569 So. 2d 794 (Fla. 1st DCA 1990), *overruled on other grounds by Ullman v. City of Tampa Parks Dep't*, 625 So. 2d 868 (Fla. 1st DCA 1993):

> The law is well settled that it is improper to litigate purely collateral matters solely for the purpose of impeaching a party or witness. Once a question is put to the party or witness on a purely collateral matter for the purposes of impeachment, the proponent of the question is bound by the witness's answer; it is inappropriate to then try the truth or falsity of the answer on the collateral matter by adducing independent proof through other witnesses.

Id. at 804. Here, the plaintiff was attempting to ask Dr. Dildy a type of fact that could bear on his opinion under section 90.704, Florida Statutes (2009). The plaintiff's cross examination did not violate **[**7]** the rule stated in *Faucher*.

The plaintiff proffered Dr. Dildy's testimony on this issue. The expert stated that, assuming Dr. Adelman's recollection of the incidence of AFE at the hospital was accurate, he would be concerned that AFE was being over-diagnosed at the Center. Yet even when confronted with statistics documenting this possibility, Dr. Dildy persisted in his opinion that Susan presented a case of AFE. He testified, "But this case here, we're talking about, it doesn't matter what all these

other cases are, this case is the case, and this case is an amniotic fluid embolism."

In closing argument, the plaintiff vigorously argued that the hospital either had an epidemic of AFE or was over-diagnosing it:

> [Dr. Adelman] said, I see one to two a year at West Boca Medical Center. I didn't put the words in his mouth. He said, I see one to two a year at West Boca Medical Center.
>
> . . . .
>
> **[*759]** [I]f you take his numbers, and you believe they have this many amniotic fluid emboluses at West Boca Medical Center every year, it is somewhere between 15 and 80 times the national average they're diagnosing amniotic fluid embolus at West Boca Medical Center, between 15 and 80 times the national average.
>
> So, **[**8]** it was either an epidemic, which there isn't, at West Boca Medical Center, or they're overdiagnosing amniotic fluid embolus. They're calling things that aren't amniotic fluid embolus, like he did in this case, . . . because they're not bothering to look at autopsies, they're not bothering to look at other records, they're not bothering to investigate why. . . .
>
> It's not the epidemic, it's that he's overstating the diagnosis, and that's wrong, ladies and gentlemen, that is flat out wrong to do, and that's what they did in this case.

The jury found no negligence by the defendants and the trial court rendered a final judgment in their favor.

The Evidentiary Ruling

Again, the principal dispute at trial was the cause of Susan's death. In response to the plaintiff's claims of negligence, the defendants contended that regardless of their handling of the emergency from cardiopulmonary arrest, it was AFE that caused Susan's death. The presence of AFE was thus the essential issue at trial. The trial court abused its discretion in failing to allow the cross-examination.

HN2 Three sections of the evidence code provide the framework for evaluating questions of relevance. The general rule is that "[a]ll **[**9]** relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2009). "Relevant evidence is [defined as] evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2009). Section 90.403, Florida Statutes (2009), establishes a limitation on the introduction of relevant evidence: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

HN3 When, on cross-examination, a piece of evidence is offered to attack the credibility of a witness on a material issue, such evidence is "relevant" under section 90.401 because credibility is central to the truth seeking function of a trial. Under subsection 90.608(5), Florida Statutes (2009), any party "may attack the credibility of a witness by . . . proof by other witnesses that material facts are not as testified to by the witness being impeached."

The object of the proposed cross-examination of the defense expert was to elicit answers leading to proof of the cause of death, the crux of the lawsuit. Dr. Adelman and Dr. Dildy both testified that the cause of death **[**10]** was AFE. Counsel sought to impeach Dr. Adelman's diagnosis with evidence showing that the incidence of diagnosed AFE at West Boca, all done by Dr. Adelman, was grossly in excess of national statistics, thus impeaching Dr. Adelman. HN4 Where the diagnosis is one of exclusion,[2] the frequency with which one comes to that conclusion is a "material fact" bearing upon the credibility of the diagnosis. The cross-examination was also relevant to Dr. Dildy's direct examination where he testified to the incidence of AFE in births and

its rarity. The trial judge **[*760]** abused his discretion in refusing to allow the cross-examination.[3]

FOOTNOTES

2 Dr. Dildy also referred to this as a "wastebasket" diagnosis.

3 We also reject the trial court's explanation that the evidence was unfairly prejudicial under section 90.403. HN5 This provision is not a general grant of authority to trial judges to bar evidence adversely impacting a party's position at trial; rather the concept of "unfair prejudice" pertains to "evidence which is directed to an improper purpose, such as evidence that inflames the jury or appeals improperly to the jury's emotions." Charles W. Ehrhardt, *Florida Evidence* § 403.1 (2006 ed.); *see also Westley v. State*, 416 So. 2d 18, 19 (Fla. 1st DCA 1982) **[**11]** (same). Unfair prejudice within the meaning of section 90.403 does not arise from relevant inquiries directed at experts offering contrary opinions relevant to a material issue at trial.

The central question to this appeal is whether the exclusion of the cross-examination amounted to harmless error. To consider that issue, it is necessary to review the development of the harmless error standard in Florida.

Harmless *Error Prior to State v. DiGuilio*

We first review the history of the harmless error rule contained in section 59.041, Florida Statutes (2009)—the circumstances leading to its enactment and how the interpretation of it has evolved since 1911.[4] The Florida cases describe a general trend away from a "correct result" test, utilized in the earliest common-law decisions and in earlier interpretations of the harmless error statute, and toward an "effect on the fact finder" test, as embodied in the Supreme Court's landmark decision in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

FOOTNOTES

4 HN6 In addition to section 59.041, section 90.104, Florida Statutes (2009) provides that a court may reverse a judgment or grant a new trial on the basis of admitted or excluded evidence "when a substantial right **[**12]** of the party is adversely affected" and the point is properly preserved in the trial court. The primary contribution of the statute to the law is its requirement of preservation. Section 90.104 adds little to harmless error analysis; if admitted or excluded evidence does not adversely affect "a substantial right of a party," its admission cannot be a "miscarriage of justice" under section 59.041

Nonetheless, some cases involving evidentiary errors apply a harmless error test based on "injury to substantial rights." *See, e.g., Tormey v. Trout*, 748 So. 2d 303 (Fla. 4th DCA 1999); *Wall v. Alvarez*, 742 So. 2d 440 (Fla. 4th DCA 1999); *Centex-Rooney Constr. Co. v. Martin Cnty.*, 706 So. 2d 20 (Fla. 4th DCA 1997). *See also Prince v. Aucilla River Naval Stores Co.*, 103 Fla. 605, 137 So. 886, 887 (Fla. 1931) ("A judgment should not be reversed or new trial granted in any case for error in rulings upon the admission or rejection of evidence unless it shall appear to the court from a consideration of the entire case that such errors injuriously affect the substantial rights of the complaining party.") (citations omitted)).

HN7 According to the "orthodox" English rule, an error in admitting or rejecting evidence was **[**13]** not a sufficient ground for a new trial unless it appeared, looking at all the evidence, that the truth had thereby not been reached. 1 Wigmore, *Evidence* § 21 (3d ed. 1940); *see also Doe v. Tyler*, (1830) 130 Eng. Rep. 1397, 1399 (C.P.) (orthodox rule). In contrast, under the more stringent "Exchequer" rule, which took hold in English and in many American courts after

the 1830s, an error at trial created *per se* a right to reversal. *See Crease v. Barrett*, (1835) 149 Eng. Rep. 1353, 1360 (Ex.).[5] The earliest Florida cases followed the orthodox rule,[6] though **[*761]** by the turn of the century some cases applied the more rigid Exchequer rule in narrow circumstances.[7]

FOOTNOTES

5 *But see* Roger J. Traynor, *The Riddle of Harmless Error* 4-8 (1970) (arguing that later cases applying a rule of *per se* reversal misinterpreted the Exchequer's decision in *Barrett*).

6 *O'Steen v. State*, 92 Fla. 1062, 111 So. 725, 730 (Fla. 1926) ("This jurisdiction appears to have followed what is known as the 'orthodox English rule,' rather than the rule announced by the Court of Exchequer in 1830 . . . "). *See also McKay v. Lane*, 5 Fla. 268, 276 (1853) ("This court has uniformly proceeded upon the practice not to reverse a judgment, however erroneously **[**14]** an isolated point may have been ruled by the Judge below, when it is clearly apparent that the party complaining has been in no degree injured by the improper ruling."); *Hooker v. Johnson*, 10 Fla. 198, 203 (1860) (same); *Randall v. Parramore*, 1 Fla. 409, 486 (1847) (same).

7 *See, e.g., Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632, 637 (Fla. 1896) (holding with regard to erroneous jury charge that "injury is presumed" and reversal appropriate where Court could not say "that the misdirection of the court did not influence the result of the verdict"); *Walker v. Parry*, 51 Fla. 344, 40 So. 69, 71 (Fla. 1906) (reversing for an erroneous jury charge, citing *Mayer*). *See generally Wadsworth v. State*, 201 So. 2d 836, 841-43 (Fla. 4th DCA 1967) (Willson, Assoc. J., dissenting) (summarizing early history of harmless error in Florida), *rev'd*, 210 So. 2d 4 (Fla. 1968).

The Exchequer rule and its influence on American courts were widely criticized for making reversal too easy. *See, e.g.*, 1 Wigmore, *Evidence* § 21. A reform movement in the United States gained steam in the early twentieth century,[8] spurred by an influential address by Roscoe Pound, in which he opined that "the worst feature of American procedure is the lavish granting **[**15]** of new trials." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 413 (1906). The American Bar Association studied the problem and suggested statutory reforms, which were adopted at the state and federal levels. *See* 33 A.B.A. Rep. 542 (1908). Florida's harmless error statute, originally enacted in 1911, *see* Ch. 6223, Laws of Fla. (1911), was almost identical to the A.B.A.'s proposed statute,[9] and has remained unchanged since:

> HN3 No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat. (2010) (formerly § 54.23, Fla. Stat.).

FOOTNOTES

8 *See generally* Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433 (2009) **[**16]** (chronicling the movement to curb excessive reversals by reforming harmless error rules).

9 That proposed model provided:

> No judgment shall be set aside, or new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

33 A.B.A. Rep. 542, 550 (1908).

Two aspects in the wording of the statute are significant. HN9 First, the statute applies in both civil and criminal cases. Second, the trigger for reversible error is the occurrence of a "miscarriage of justice"; how the courts have defined this term has determined the scope of the statute's application since its enactment.

The 1911 harmless error statute differs in one important respect from the A.B.A. model set forth in footnote 9. The Florida statute adds the last sentence: "This section shall be liberally construed." While a "strict construction" of a statute would **[**17]** consider "only the literal words of [the] writing," a liberal construction is "[a]n interpretation that applies a writing **[*762]** in light of the situation presented and that tends to effectuate the spirit and purpose of the writing." *Black's Law Dictionary* 332 (8th ed. 2004). The purpose of the harmless error statute is to enhance finality by limiting the granting of new trials. However, by insisting on a liberal construction, the statute allows for discretion and flexibility in its interpretation; the term "miscarriage of justice" should not be construed so narrowly that reversal is a rarity.[10]

FOOTNOTES

10 There are two plausible explanations for the legislative softening of the language from the model statute. One explanation is that the problem of excessive reversals does not seem to have been as serious in Florida where the infamous Exchequer rule never fully took hold, compared to other jurisdictions. Legislators may have worried that a radical cure would be worse than the mild disease. Another explanation is that in a state like Florida, with a strong tradition of electing state judges, legislators expected that the ballot box would be a more effective check on abuses of judicial discretion than **[**18]** statutory rules, and therefore saw little purpose in tying judges' hands.

In the years following the passage of the harmless error statute in 1911, HN10 the Florida Supreme Court used two tests to define a "miscarriage of justice" giving rise to a reversible error: a "but-for," "correct result," test that is oriented on the outcome, and the more forgiving "effect on the fact finder" test that is oriented on the process.

A "correct result" approach asks whether, despite the error, the trial court reached the correct result. It assumes that when the result was correct, there cannot have been a "miscarriage of justice." *But see* Traynor, *supra* note 5, at 18-22 (criticizing this approach). The question is, would the result have been the same without the error? Or, but for the error, would the result have been different? An "effect on the fact finder" approach, on the other hand, asks whether the error influenced the trier of fact and contributed to the judgment, not just whether it changed the result. Looking at the record as a whole, did the error mislead the trier of fact? *See id.* at 22-23 (discussing benefits of this approach). The former approach effectively narrowed the class of cases that **[**19]** could be reversed; the latter broadened it.

The most commonly used test, the "but-for" formulation, focused on whether the result of the trial would have been different but for the error. This outcome oriented approach considered whether the "wrong" result was reached as a result of the error. A typical criminal case, *Henderson v. State*, 94 Fla. 318, 113 So. 689 (Fla. 1927), illustrates the Supreme Court's early interpretation of the harmless error statute:

> The language of the statute . . . makes it clear that it was the purpose of the Legislature that verdicts and judgments of trial courts should not be overturned and set aside by this court on account of mere errors committed in the court below unless it is made to appear to this court, after inspection of the entire record, that the errors complained were prejudicial and injurious in their nature and tendency and resulted in a miscarriage of justice. This statute was, no doubt, based upon the idea that if the result of a trial, the verdict and judgment, was just and right, even though there were technical errors committed by the trial court, no good purpose could be subserved by the labor, expense, and delay of trying the case over again. And **[**20]** to make [this] intention effective, *the statute was so framed as to require it to be made to appear to the reviewing court that the error complained of caused, or at least contributed to causing or reasonably tended to cause, the* **[*763]** *result, and that the result was wrong—a miscarriage of justice*.

Id. at 697-98 (emphasis added). This equation of a "miscarriage of justice" with a "wrongful result" characterizes much of the Supreme Court's early harmless error jurisprudence, and harkens back to Florida's earlier application of the orthodox English rule.[11]

FOOTNOTES

11 *See also Johnson v. State*, 61 So. 2d 179, 179 (Fla. 1952) ("[A]ny error in allowing such statements to remain in the confession was harmless when considered in context with the entire record, and we cannot find that it could have had any effect whatsoever in the ultimate outcome of the case."); *Cornelius v. State*, 49 So. 2d 332, 335 (Fla. 1950) ("In determining whether the error . . . was harmful or prejudicial, we must decide upon examination of all the evidence whether the result would have been different had the improper evidence been excluded."); *Banks v. State*, 116 Fla. 834, 156 So. 905, 906 (Fla. 1934) ("[U]nder the facts shown by the record, the **[**21]** jury should not have returned any other verdict than that which was returned.").

The same outcome oriented analysis also prevailed in some early civil cases. In *E.O. Roper, Inc. v. Wilson & Toomer Fertilizer Co.*, 116 Fla. 796, 156 So. 883 (Fla. 1934), the Supreme Court held that even if the trial court committed technical errors, under the harmless error statute, its judgment would not be set aside where

> the record as a whole shows that *the judgment rendered accords with justice in the premises*, and that a reversal of the cause for the correction of such technical errors as may have occurred must *inevitably lead to the rendition of a new judgment identical with that now appealed from* . . . .

Id. at 884 (emphasis added). This interpretation of the harmless error statute focused on the legislative purpose of conserving judicial resources; because the statute was designed to reduce the waste caused by needless retrials of cases reversed for technical error, it was therefore applied to prevent reversal whenever errors would not have altered the outcome.[12]

FOOTNOTES

12 Other civil cases applying the outcome oriented analysis are *Rance v. Hutchinson*, 131 Fla. 460, 179 So. 777, 780 (Fla. 1938); *Herman v. Peacock*, 103 Fla. 438, 137 So. 704 (Fla. 1931); **[**22]** *Routh v. Richards*, 103 Fla. 757, 138 So. 72 (Fla. 1931).

Other early civil and criminal cases focus less on the correctness of the outcome and more on whether the decision-making process was compromised; these cases apply an "effect on the fact finder" test for harmless error. For example, *Eggers v. Phillips Hardware Co.*, 88 So. 2d 507 (Fla. 1956), involving an action for injuries to a pedestrian caused by a truck driver, held it was error

to admit into evidence the testimony of the investigating officers that, following the investigation, they had not arrested the driver for breaking any of the city's traffic ordinances. The Court reversed the trial court's judgment for the defendant and remanded for a new trial on the grounds that the erroneously admitted evidence might have influenced the jury's verdict:

> There was a direct conflict in the evidence at the trial on this vital point [whether the defendant ran a red light] and *it may well be* that the fact of the non-arrest of defendant *might have balanced the issue* in favor of the defendant. We think that the ends of justice would best be served by submitting this issue to another jury, so that it can be decided without the defendant's having the benefit **[**23]** of the inadmissible evidence in question.

Id. at 508 (emphasis added).

Further, an early criminal case anticipates the *DiGuilio* test of a "reasonable possibility" of an effect on the verdict. *See* **[*764]** *infra* pp. 11-13. In *Pearce v. State*, 93 Fla. 504, 112 So. 83 (Fla. 1927), the defendant challenged his conviction for murder on the grounds that improperly excluded evidence of a pair of bloody brass knuckles found at the crime scene, together with evidence of the defendant's head wounds, would have supported his claim of self-defense. The Supreme Court agreed and used an analysis that emphasized the effect that the excluded evidence might have had on the jury:

> It is impossible to say with any degree of certainty that, if the evidence of the finding of a 'piece of a pair of knucks' [sic] near the scene of the difficulty had been admitted for consideration by the jury . . . , the jury would not have accounted for the wounds on the head of the defendant upon the theory that the deceased had attacked him with metallic knuckles.

Id. at 86.

And, fifteen years before *DiGuilio*, the Supreme Court applied an "effect on the fact finder" harmless error test in a civil case, but without explicitly characterizing its approach. **[**24]** In *Stecher v. Pomeroy*, 253 So. 2d 421 (Fla. 1971), a personal injury action, the trial court erroneously admitted evidence about the extent of the defendant's insurance coverage; the Supreme Court held that the error was harmless "in light of the fact that the verdict was $ 19,000 despite policy limits of $ 100,000/$ 300,000; where there was a disc involvement with serious and prolonged disability, traction and hospitalization; and where the injuries were permanent." *Id.* at 422. The Supreme Court emphasized that the error was harmless, and not a basis for reversal, when considered in the context of the whole trial, because the record showed that it did not contribute to the judgment.

> This recognition of harmless error in these particular circumstances is not to be regarded as approval by this Court of the mention of policy limits to a jury. This should not be done. Nor is it approval of the trial court's refusal to grant the requested instruction to disregard, which should have been given. It is simply held to be harmless error here where an examination of the entire record reflects a tone which indicates in no wise any adverse effect upon the jury's verdict.

Id. (footnote omitted). In **[**25]** essence, the Supreme Court set the defense oriented verdict against the abundant evidence favorable to the plaintiff and concluded that the erroneous admission of the defendant's insurance coverage had little effect on the jury's verdict.

From *Eggers* and *Stecher*, we distill two general propositions about harmless error analysis in civil cases: First, to determine whether an error is harmful, the appellate court must examine the entire record. Second, the central issue is whether the error had an adverse effect upon the jury's verdict; in other words, whether the error contributed to the judgment.[13] Such was the state of the law before *DiGuilio*.[14]

FOOTNOTES

13 *See also Josey v. Futch*, 254 So. 2d 786, 787 (Fla. 1971) (following *Stecher*) ("[T]he essential consideration is evidence of influence on the jury . . . .").

14 In 1985, the year before *DiGuilio*, Justice Overton noted that the Florida Supreme Court had "never expressly set forth a harmless error test for the appellate courts of this state to apply in civil cases." *Fla. Patient's Comp. Fund, Inc. v. Von Stetina*, 474 So. 2d 783, 793-94 (Fla. 1985) (Overton, J., concurring in part and dissenting in part). But Justice Overton added that, in general, **[**26]** "[t]he application of the harmless error statute requires an appellate court to consider the entire record and determine whether the verdict was affected by the error." *Id.* at 793.

[*765] State v. DiGuilio

HN11 *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), is the touchstone for harmless error analysis in Florida. In it, the Supreme Court firmly establishes an "effect on the fact finder" harmless error test for criminal cases.

In *DiGuilio*, testimony from a police officer about his arrest of an alleged cocaine trafficker was interpreted as a comment on the defendant's silence. *Id.* at 1130-31. The Fifth District ordered a new trial, applying a rule of *per se* reversal for comments on a defendant's silence. *Id.* at 1134. The Supreme Court rejected a rule of *per se* reversal, and instead adopted the harmless error test announced by the U.S. Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The Court explained the test:

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable **[**27]** possibility that the error contributed to the conviction.

DiGuilio, 491 So. 2d at 1135 (citation omitted). This "effect on the fact finder" test focuses on the likelihood that an error at trial influenced the trier of fact and contributed to the judgment. If it is reasonably possible that the error contributed to the verdict, then the verdict must be set aside, even when, in the reviewing judge's opinion, the verdict would have been the same without the error. The error and its probable effects must be evaluated in light of the other evidence:

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. Following Chief Justice Traynor,[15] the Supreme Court emphasized that HN12 applying the harmless error test is not simply a matter of reviewing the evidence left untainted by error to determine whether it is sufficient to support the judgment. *Id.* at 1136. Instead, the appellate court places the error in the context of the other **[**28]** evidence to estimate the effect of the error on the trier of fact. The purpose of the analysis, in other words, is not to retry the case without the error, but to reconstruct the original trial to determine what role, if any, the error played in the judgment. As the Court said:

> HN13 The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

Id. at 1139. Thus, even abundant evidence in support of a verdict will not prevent reversal when the appellate court cannot say, after reviewing the whole record, that there is no "reasonable possibility that the **[*766]** error affected the verdict." *Id.* The "burden to show that the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error **[**29]** is by definition harmful." *Id.*

FOOTNOTES

15 *See* Traynor, *supra* note 5, at 18-22 (arguing against a "correct result" test for harmless error); *see also People v. Ross*, 67 Cal. 2d 64, 60 Cal. Rptr. 254, 429 P.2d 606, 620-21 (Cal. 1967) (Traynor, C.J., dissenting) (same), *rev'd*,391 U.S. 470, 88 S. Ct. 1850, 20 L. Ed. 2d 750 (1968) (citing, *inter alia, Chapman*).

The *DiGuilio* test for harmless error, which draws heavily on Chief Justice Traynor's insights, contrasts sharply with the "correct result" test applied by the Supreme Court in the decades following the enactment of the harmless error statute in 1911. Under the "correct result" test, a judgment generally could not be reversed unless the appellate court concluded that the outcome of the trial would have been different, but for the error. Under the *DiGuilio* test, a judgment should be reversed, and a new trial granted, whether or not the outcome of that trial is likely to be different whenever the appellate court believes there is a reasonable possibility that the error influenced the trier of fact and contributed to the verdict.

HN14 The differences between a "correct result" test and an "effect on the fact finder" test are subtle but important. An "effect on the fact finder" test asks the appellate judge to look closely **[**30]** at the error and estimate its effect on the trier of fact. A "correct result" test asks the judge to look at everything but the error and determine whether the verdict in a trial without it would have been different. In short, one test focuses on process; the other on the end result. Moreover, a "correct result," or "but-for," test asks the judge to exclude the wrongly admitted evidence (or include the wrongly rejected evidence) and weigh the evidence anew—precisely what *DiGuilio* forbids. *See DiGuilio*, 491 So. 2d at 1136.

***Supreme Court Civil Cases After* DiGuilio**

While the Florida Supreme Court has not explicitly adopted a standard for harmless error in civil cases after *DiGuilio*, three cases employed an "effect on the fact finder" test akin to the one that the court applied in *DiGuilio*.

Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), established two things about harmless error analysis. First, the court expressly placed the burden on the beneficiary of an error in the trial court to demonstrate on appeal that the error was harmless. Second, the court used an effect on the verdict analysis to determine whether harmless error had occurred. In *Gormley*, the Supreme Court ordered **[**31]** a new trial after finding that the introduction of collateral source evidence may have influenced the jury's verdict for a defendant. The court explained why the burden to prove the harmlessness of the error was on the defendant-appellee, which injected the improper evidence into the trial.

> Equity and logic demand that the burden of proving such an error harmless must be placed on the party who improperly introduced the evidence. Putting the burden of proof on the party against whom the evidence is used . . . would simply encourage the introduction of improper evidence.

Id. at 459. The Court held that the defendant-appellee had failed to meet its burden to establish that the erroneous introduction of the collateral source evidence was harmless—because the issue of liability was close, the Supreme Court "[could not] say that the jury's verdict on liability was not improperly influenced by the evidence of the [plaintiffs'] insurance claim." *Id.*[16]

FOOTNOTES

16 *See also Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 751 (Fla. 2002) ("[I]f there has been error in the admission of evidence, the burden is on the beneficiary of the error to establish that the error was harmless." (citing *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 203 (Fla. 2001)).

[*767] A **[**32]** second case applying *DiGuilio's* "effect on the fact finder" analytical framework is *Sheffield v. Superior Insurance Co.*, 800 So. 2d 197 (Fla. 2000). There, the trial court denied the plaintiff's motion to exclude collateral source evidence, and the plaintiff, after stipulating that she would have a standing objection to the introduction of the evidence, introduced her own rebuttal collateral source evidence. *Id.* at 199. Although the jury found for the plaintiff, they found no permanent injury and awarded only her past medical expenses and $ 6,554.61 for future medical expenses. *Id.* The first district affirmed, holding that Sheffield invited the error by introducing her own collateral source evidence. *Id.*

The Supreme Court reversed. It held that (1) allowing any collateral source evidence was error because of "the inherently damaging effect of the jury hearing collateral source evidence on the issues of liability and on issues of damages:" and (2) that Sheffield did not waive her objection to that evidence by introducing her own collateral source evidence following the trial court's denial of her motion in limine. *Id.* at 203 (citing, *inter alia, Gormley*). The court explained the reversal **[**33]** with language that evaluated the effect of the improper evidence on the jury:

> [G]iven the inherently prejudicial effect of such evidence, which is the very reason the collateral evidence rule was first established, we cannot conclude that in this case the introduction of collateral source evidence was harmless. *The jury certainly could have concluded* that because Sheffield had group insurance available to cover future medical expenses, there would be no need to award substantial damages for the future.

Id. (emphasis added). The italicized language demonstrates the Supreme Court's conclusion that the error was not harmless, because the appellee had failed to demonstrate that it was more likely than not that the error did not contribute to the verdict.

A third *post-DiGuilio* civil case is *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006). In that medical malpractice case, the court did not explicitly apply a harmless error test, but held that a trial court's error in allowing an expert witness to testify that she had consulted with colleagues before forming her opinion "was not harmless because the competing expert opinions on the proper standard of care were the focal point of this medical malpractice **[**34]** trial." *Id.* at 1041. This reasoning is consistent with an "effect on the fact finder" test because it recognizes that in a "battle of the experts" the trier of fact would likely be influenced by the credibility of an expert witness which had been enhanced by the hearsay confirmation of other doctors.

In summary, in civil cases after *DiGuilio*, HN15 the Supreme Court has utilized an "effect on the fact finder" test for harmless error in civil cases, even though it has not explicitly declared so.[17] The court has expressly declared that on appeal the burden of proving the harmlessness of an error is on the beneficiary of the error in the trial court, who improperly introduced the offending evidence.

FOOTNOTES

17 *See also Tallahassee Mem'l Reg'l Med. Ctr. v. Meeks*, 560 So. 2d 778, 782 (Fla. 1990) ("Considering the totality of the evidence, we conclude that the introduction of this one privileged statement did not prejudicially affect the jury's determination of negligence and that no reversible error occurred in its admission.").

[*768] District Court of Appeal Harmless Error Cases

Without specific guidance from the Supreme Court, the district courts of appeal have drifted in different directions in applying a section 59.041 **[**35]** harmless error test to civil cases.[18] There are three principal lines of cases applying tests for harmless error in the district courts. The most stringent test, occurring primarily in this district, derives from language contained in the earlier Supreme Court cases, and asks whether the result would have been different, but for the error.[19] Another strain of decisions, from the first and third districts, lowers the bar for harmful error, and asks whether the result *may* have been different had the error not occurred.[20] Finally, a third line of cases, mostly from the second district, asks whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error.[21] The last two tests are arguably similar to each other, but the test most frequently applied by this court is clearly more stringent.

FOOTNOTES

18 Recently, now-Chief Justice Canady acknowledged the split in the lower courts over the test for harmless error:

> The requisite prejudice to support overturning the judgment based on the jury's verdict can be established neither under a harmless error standard requiring a showing of a *reasonable probability* of a result more favorable to the appellant if **[**36]** the error had not occurred, *see Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d DCA 1979), nor under a standard requiring a showing that the appellant *might have* obtained a more favorable result but for the error, *see National Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840, 843 (Fla. 1st DCA 2000).

Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1089 (Fla. 2009) (Canady, J., dissenting) (emphasis in original).

19 *See Hayes v. State*, 55 So. 3d 699 (Fla. 4th DCA 2011) (civil commitment); *Petit-Dos v. Sch. Bd. of Broward Cnty.*, 2 So. 3d 1022 (Fla. 4th DCA 2009), *rev. denied*, 19 So. 3d 311 (Fla. 2009); *Marshall v. State*, 915 So. 2d 264 (Fla. 4th DCA 2005) (civil commitment); *Kammer v. Hurley*, 765 So. 2d 975 (Fla. 4th DCA 2000); *Pascale v. Fed. Exp. Corp.*, 656 So. 2d 1351 (Fla. 4th DCA 1995); *Nationwide Mut. Fire Ins. Co. v. Vosburgh*, 480 So. 2d 140 (Fla. 4th DCA 1985); *Aristek Cmtys., Inc. v. Fuller*, 453 So. 2d 547 (Fla. 4th DCA 1984); *Anthony v. Douglas*, 201 So. 2d 917 (Fla. 4th DCA 1967). *See also Dessanti v. Contreras*, 695 So. 2d 845, 849 (Fla. 4th DCA 1997) (Hauser, Assoc. J., concurring in part and dissenting in part) (citing *Pascale, Aristek*, and *Anthony*).

20 *See Witham v. Sheehan Pipeline Constr. Co.*, 45 So. 3d 105 (Fla. 1st DCA 2010); **[**37]** *Hogan v. Gable*, 30 So. 3d 573 (Fla. 1st DCA 2010); *Healthcare Staffing Solutions, Inc. v. Wilkinson ex rel. Wilkinson*, 5 So. 3d 726 (Fla. 1st DCA 2009); *Gold v. W. Flagler Assocs., Ltd.*, 997 So. 2d 1129 (Fla. 3d DCA 2008); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899 (Fla. 3d DCA 2003); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840 (Fla. 1st DCA 2000); *Katos v. Cushing*, 601 So. 2d 612 (Fla. 3d DCA 1992).

21 *See In re Commitment of DeBolt*, 19 So. 3d 335 (Fla. 2d DCA 2009); *Esaw v. Esaw*, 965 So. 2d 1261 (Fla. 2d DCA 2007); *Fla. Inst. for Neurological Rehab., Inc. v. Marshall*, 943 So. 2d 976 (Fla. 2d DCA 2006); *Damico v. Lundberg*, 379 So. 2d 964 (Fla. 2d DCA 1979) (citing *Stecher*) (on rehearing).

Under this court's stringent "but-for" formulation, it is difficult for an appellant to establish harmful error, that a "miscarriage of justice" occurred within the meaning of section 59.041. The

line of cases applying this "but-for" test began with *Anthony v. Douglas*, 201 So. 2d 917 (Fla. 4th DCA 1967). Though it has often been cited by this court, *Anthony* rests on shaky footing. *Anthony* cites two cases in support of its test for harmless error, i.e., "whether, but **[**38]** for the error complained of, a different result would have been reached by the jury." *Id.* at 919.

The first, *Cornelius v. State*, 49 So. 2d 332, 335 (Fla. 1950), is a criminal case that **[*769]** predates *DiGuilio*. Following other criminal cases from the same period, *see supra, Cornelius* states the test for harmful error as "whether the result would have been different had the improper evidence been excluded." *Id.* The persuasiveness of *Cornelius* has been undercut by the different direction the Supreme Court took in *DiGuilio*.

The second case cited as authoritative in *Anthony, Banco Nacional de Cuba v. Steckel*, 134 So. 2d 23, 25 (Fla. 3d DCA 1961), does not articulate any test for harmless error, holding only that, "[w]hile the defendant contends the trial court erred in striking his defensive motions, this could constitute no more than harmless error where summary final judgment was properly entered." In fact, the holding in *Banco Nacional* does not appear to support any one test for harmless error, so it is unclear why we cited it as authoritative in *Anthony*. This stringent "but for" test, which characterizes almost every error as harmless, encourages evidentiary gambles on questionable evidence **[**39]** in the trial court, placing a premium on winning at all costs, because only the most egregious evidentiary errors will result in reversal.

Like the outcome oriented approach in this district, the second line of cases, from the first and third districts, focuses on the impact of the improperly admitted evidence on the outcome of the trial. These cases appear to have sprung from a footnote in *Marks v. Delcastillo*, 386 So. 2d 1259, 1267 n.15 (Fla. 3d DCA 1980), which stated, without citation:

> We tentatively suggest the following as a shorthand-rule of thumb approach to this and related questions as applied to civil cases: fundamental error occurs when the result would have been different; reversible error, when the result might have been different; harmless error, when it would not have been different.

In *Katos v. Cushing*, 601 So. 2d 612, 613 (Fla. 3d DCA 1992), this "tentative suggestion" morphed into persuasive authority for the proposition that "[t]he test for harmless error is whether, but for the error, a different result may have been reached." *Katos* in turn has often been cited as stating the proper test for harmless error in civil cases.[22] This test eases the difficulty of the strict **[**40]** "but-for" test by requiring some lesser degree of probability that the result in the case would have been different.[23]

FOOTNOTES

22 *See, e.g., Hogan*, 30 So. 3d at 575; *Gold*, 997 So. 2d at 1130-31 (also citing *Marks*); *Blackmon*, 754 So. 2d at 843. *See also Gencor Indus. Inc. v. Fireman's Fund Ins. Co.*, 988 So. 2d 1206, 1209 (Fla. 5th DCA 2008); *USAA Cas. Ins. Co. v. McDermott*, 929 So. 2d 1114, 1117 (Fla. 2d DCA 2006).

23 It is unclear exactly what degree of probability the test requires. But we can safely assume that "may" implies a lesser degree of probability than "would," which implies near-certainty.

The third line of cases, starting with *Damico v. Lundberg*, 379 So. 2d 964 (Fla. 2d DCA 1979) (on rehearing), uses somewhat different language to put a finer point on the test of the probability of a different result. In *Damico*, the second district held that an "error is reversible only when, considering all the facts peculiar to the particular case under scrutiny, it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." *Id.* at 965 (citing *Stecher*, 253 So. 2d at 422).[24] This test differs from the *DiGuilio* **[*770]** test for harmless **[**41]** error in two ways. First, it requires a "reasonable probability," rather than a mere "reasonable possibility." Second, it focuses on the probability of a different outcome on retrial rather than the probability that the error contributed to the outcome

in the actual trial.

FOOTNOTES

24 This interpretation of the harmless error statute accords with the longstanding interpretation of a similar constitutional provision in another jurisdiction. *Cf.* Cal. Const. art. VI, § 13 (formerly art. VI, § 4 1/2); *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243, 254 (Cal. 1956) ("[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (citation omitted)).

We believe that the district courts of appeal have primarily used a variation of outcome-oriented analysis in approaching the harmless error conundrum instead of employing the process-oriented "effect on the fact finder" approach that the Supreme Court adopted in *DiGuilio* and reaffirmed in *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999) and *Ventura v. State*, 29 So. 3d 1086 (Fla. 2010).

At **[**42]** least one of our civil cases appears however to apply an "effect on the fact finder" test similar to the one applied in *DiGuilio. Mattek v. White*, 695 So. 2d 942 (Fla. 4th DCA 1997) was a personal injury action arising from an auto accident. The trial court allowed a physicist, who was an accident reconstruction and biomechanics specialist, to offer his opinion that the collision could not have caused permanent injury to the plaintiff. *Id.* at 943. We held it was error to admit the physicist's testimony about permanent injury because the physicist was not a qualified medical expert. *Id.*

Holding that the error was harmful, we said: "We cannot find the error in admitting this testimony to be harmless because there was ample evidence in this case that plaintiff did have a permanent injury, and the admission of [the physicist's] opinions regarding permanency *could well have been what persuaded the jury* to find no permanency." *Id.* at 944 (emphasis added). Here, as in *DiGuilio*, "[t]he focus [was] on the effect of the error on the trier-of-fact." 491 So. 2d at 1139.[25] But *Mattek*, with its "effect on the fact finder" test, stands as an island in a sea of cases applying outcome-oriented, "but-for" **[**43]** analyses.

FOOTNOTES

25 We also looked at the effect of the error on the trier of fact in another recent civil case. *See Gen. Motors Corp. v. McGee*, 837 So. 2d 1010, 1036 (Fla. 4th DCA 2002) ("We agree with GM that two errors occurred during the trial, but we find those errors to be harmless in the context of this case . . . The jury was not swept away by the emotions of the attorneys. The jury's verdict separated the issues of liability and damages from that of punitive damages.").

Harmless Error in Civil Cases

In formulating a harmless error test in civil cases, it is important to recognize that *DiGuilio* derived its formulation from the elevated burden of proof in criminal cases:

> The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove *beyond a reasonable doubt* that the error complained of did not contribute to the verdict or, alternatively stated, that there is *no reasonable possibility* that the error contributed to the conviction.

DiGuilio, 491 So. 2d at 1135 (emphasis added) (citation omitted). This elevated test acknowledges (1) the higher burden of proof in criminal cases, which amplifies the potential effect of an evidentiary error on the trier **[**44]** of fact, and (2) the special concern for the legitimacy of criminal convictions expressed in the constitutional and statutory protections accorded to

criminal defendants. A harmless error test for civil cases should acknowledge the particular attributes of those cases.

[*771] As in a criminal case, the approach to harmless error analysis in a civil case should begin with an examination of the entire record by the appellate court,[26] including a close examination of both the permissible evidence upon which the jury could have relied and the impermissible evidence which may have influenced the verdict. The focus of the analysis is to evaluate the effect of the error on the trier of fact to determine whether or not the error contributed to the judgment. We agree with Chief Justice Traynor that HN16 a "reasonableness" standard is inappropriate for a harmless error analytical framework because it does not specify a degree of probability:

> The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion. Discretion is at least under better control within tests that focus on the degree of probability **[**45]** as more probable than not, highly probable, or almost certain.

Traynor, *supra* note 5, at 34-35.

FOOTNOTES

26 *See also Medina v. Peralta*, 724 So. 2d 1188, 1189-90 (Fla. 1999) ("When examining an evidentiary ruling under section 59.041, we are required to look at the entire record.").

Just as the Supreme Court used the burden of proof in a criminal case to describe the harmless error standard in *DiGuilio*, so should the burden of proof in civil cases inform the harmless error standard here: HN17 harmless error occurs in a civil case when it is more likely than not that the error did not contribute to the judgment. To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict.

This test for harmless error is consistent with the way the Supreme Court approached the issue in *DiGuilio, Gormley, Sheffield*, and *Linn*. Because section 59.041 applies to both criminal and civil cases, the same type of "effect on the fact finder" harmless error analysis should be used in both types of cases, with the adjustment in civil cases that takes the lower burden of proof into consideration. **[**46]** The "more likely than not" burden is not insurmountable for an appellee contending that a trial error was harmless; it is consistent with the "liberal construction" of the statute mandated by the legislature.

The lower burden also effectuates the statutory goal of enhancing finality in a way that recognizes the different stakes involved in criminal and civil cases. Criminal cases involve a deprivation of liberty, not merely financial loss, so the procedural and substantive law emphasizes the goal that the end result in a criminal case be just and right. Social policy places a greater premium on finality in civil cases than in criminal cases, a finality that should come sooner rather than later. Put differently, society is willing to tolerate more mistakes in civil cases than it will in criminal ones. This policy preference for a quick finality in civil cases supports our decision to require the appellee to demonstrate not that there was a high probability that the error did not affect the verdict, or that there was a reasonable probability that it did not, but that, more likely than not, the error had no such harmful effect.

We therefore recede from the line of cases in footnote 19, **[**47]** which apply a strict, outcome-determinative "but-for" test for harmless error. We also certify the following question to the Supreme Court as being of great public importance:

> IN A CIVIL APPEAL, SHALL ERROR BE HELD HARMLESS WHERE IT IS MORE LIKELY THAN NOT **[*772]** THAT THE ERROR DID NOT CONTRIBUTE TO THE JUDGMENT?

Applying the Harmless Error test in This Case

The question here was whether the trial court's refusal to allow the proposed cross-examination of Dr. Dildy was harmless error. The ultimate purpose of the proposed cross-examination was to call into question the hospital's AFE diagnosis by suggesting that the hospital diagnosed that condition about 15 times more than the rate elsewhere. This issue was presented to the jury through the testimony of Dr. Adelman and in part from Dr. Dildy. This evidence allowed the plaintiff's attorney in closing argument to hammer on the significance of the statistical abnormality. During the proffer of Dr. Dildy, he said that if the incidence of AFE at the hospital were accurate, he would be concerned that AFE was being over-diagnosed. Yet, even when confronted with the statistics documenting this possibility, he persisted in his opinion that Susan presented **[**48]** a special case of AFE. He testified, "But this case here, we're talking about, it doesn't matter what all these other cases are, this is this case, and this case is an amniotic fluid embolism."

Considering all of the testimony, the jury had the full ability to take the statistical anomaly into consideration; the omitted testimony added little to the plaintiff's case. Having reviewed the entire record, we conclude that it is more likely than not that the restriction on the cross-examination of Dr. Dildy did not contribute to the verdict. The error was harmless.

Accordingly, we affirm the judgment entered below. We withdraw the panel opinion previously issued in this case and substitute this opinion in its place.

MAY, C.J., WARNER, POLEN, STEVENSON, TAYLOR, and CIKLIN, JJ., concur.
DAMOORGIAN, J., concurs specially with opinion, in which MAY, C.J., concurs.
CONNER, J., concurs in majority opinion only in result and specially with opinion, in which LEVINE, J., concurs.
HAZOURI and GERBER, JJ., recused.

CONCUR BY: DAMOORGIAN; CONNER

CONCUR

DAMOORGIAN, J., concurring specially.

We commend Judge Gross for his thorough review of the history of the harmless error test and for his logical formulation of the "more likely **[**49]** than not" harmless error test for civil cases. Given the supreme court precedent upon which Judge Gross bases the majority opinion, we are compelled to concur that this court, going forward, should apply the "more likely than not" harmless error test in civil cases.

However, if we were writing on a clean slate, we would argue that the only harmless error test we should apply in civil cases is the plain language of Florida's harmless error statute.

As the majority opinion points out, before 1911, the common law established two different harmless error rules: (1) the "orthodox" rule by which an error was not a sufficient ground for a new trial unless it appeared, looking at all the evidence, that the truth had not been reached as a result; and (2) the more stringent "Exchequer" rule by which an error at trial created *per se* a right to reversal. The shift in the early twentieth century from the orthodox rule to the Exchequer rule was widely criticized for making reversal too easy. Therefore, at the suggestion of the American Bar Association, the Florida Legislature, in 1911, enacted Florida's harmless error statute:

> **[*773]** No judgment shall be set aside or reversed, or new trial granted by any **[**50]** court of the state in any cause, civil or criminal, on the ground of

> misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat. (2010) (formerly § 54.23, Fla. Stat.).

The harmless error statute, which has remained unchanged in one hundred years, is unambiguous. The legislature has entrusted the courts to set aside or reverse a judgment, or grant a new trial, only when the error complained of has resulted in a miscarriage of justice. Whether a miscarriage of justice has occurred is to be determined on a case-by-case basis after an examination of the entire case. If the determination is a close question, then a liberal construction favors setting aside or reversing the judgment or granting the new trial. In short, the legislature has entrusted the courts to recognize a "miscarriage of justice" as that phrase is commonly used, and "[t]he authority of the legislature **[**51]** to enact harmless error statutes is unquestioned." *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986).

As the majority opinion points out, however, over the last hundred years, courts have sought to further interpret the phrase "miscarriage of justice." The majority opinion seeks to justify that exercise by citing to the harmless error statute's last sentence, "This section shall be liberally construed." However, we do not read the statute's last sentence as the legislature's express invitation for the courts to further interpret "miscarriage of justice." Rather, the statute's last sentence merely provides that if the determination of whether a miscarriage of justice has occurred is a close question, then a liberal construction favors setting aside or reversing the judgment or granting the new trial.

Nevertheless, over the last hundred years, courts apparently have treated the phrase "miscarriage of justice" as being ambiguous and therefore have attempted to formulate more specific tests to determine whether a miscarriage of justice has occurred. As the majority opinion points out, courts have formulated two tests: (1) a "but-for," "correct result" test which focuses on the outcome; **[**52]** and (2) the more forgiving "effect on the fact finder" test which focuses on the process.

In our view, these two tests merely have returned us to where we were a century ago when courts debated over whether to apply the "orthodox" rule or the "Exchequer" rule to determine whether error was harmful or not. But today, the harmless error statute already is in effect. The statute is unambiguous. The statute should be applied according to its plain language in civil cases rather than continuing our century-old struggle to further define the phrase "miscarriage of justice." As our supreme court stated in *Daniels v. Florida Department of Health*, 898 So. 2d 61 (Fla. 2005):

> When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. When the statutory language is clear, courts have no occasion to resort to rules of construction — they must read the statute as written, for to do otherwise **[*774]** would constitute **[**53]** an abrogation of legislative power.

Id. at 64-65 (internal citations and quotations omitted); *see also DiGuilio*, 491 So. 2d at 1137 ("[O]ur responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have as individuals.") (citations omitted).

In defense of our argument to apply the harmless error statute's plain language in civil cases, we foresee two concerns. First, some may be concerned that one judge's subjective view of a "miscarriage of justice" may be different than another judge's subjective view of a "miscarriage of justice." We harbor no such concern. We routinely apply the phrase "miscarriage of justice" in

exercising our discretion to grant or deny certiorari review. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) ("A district court should exercise its discretion to grant certiorari review only when there has been a violation of a clearly established principle of law resulting in a *miscarriage of justice*.") (emphasis added; citations omitted). More importantly, we have faith in our colleagues' experience and wisdom **[**54]** to recognize a miscarriage of justice when they see it.

Much more often than not, three judges of this court review the same record and arguments on a given case and reach the same conclusion. On the rare occasions when we disagree as to a conclusion, our judicial system is structured to resolve that disagreement in an orderly way -- the majority's conclusion prevails. If the majority of judges on a particular panel conclude that the error complained of has resulted in a miscarriage of justice, then we should set aside or reverse the judgment or grant the new trial. If the majority concludes otherwise, then we should affirm.

Second, some may be concerned that our argument to apply the harmless error statute's plain language in civil cases merely would devolve into the "but for," "correct result" test by another name. We harbor no such concern here either. Certainly situations exist in which a "miscarriage of justice" can occur even though the result would have been the same without the error.

Perhaps the most obvious situation is when a trial court's error violates a party's constitutional rights in a criminal case. In such situations, we are not required to set aside or reverse a judgment **[**55]** or grant a new trial. *See Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

However, we have set aside or reversed judgments or granted new trials because of a constitutional error, even though the result would have been the same without the error. *Compare, e.g., Arnold v. State*, 807 So. 2d 136, 141-42 (Fla. 4th DCA 2002) (trial court's error in admitting DNA evidence at trial without giving the defendant an opportunity to present conflicting evidence constituted a violation of his due process rights, was not harmless, and required the reversal of the defendant's conviction) with *Arnold v. State*, 53 So. 3d 1042 (Table) (Fla. 4th DCA 2011) (indicating the same defendant's ultimate conviction after the reversal).

We recognize that applying the harmless error statute's plain language in civil cases may not be a perfect solution. *See Chapman*, 386 U.S. at 22-23 **[*775]** ("What harmless-error rules all aim at is a rule that will save **[**56]** the good in harmless-error practices while avoiding the bad, *so far as possible*.") (emphasis added). But if application of the harmless error statute's plain language is flawed, it is no more flawed than the current two harmless error tests, the latter of which we are compelled to apply to civil cases beginning today.

We say this for two reasons. First, no language exists on the face of the harmless error statute suggesting that the legislature intended for courts to determine whether a miscarriage of justice has occurred based on the error's effect on the trier of fact, be it in the result or the process. Second, the current harmless error tests require appellate judges to speculate on what effect the error may have had on the trier of fact, be it in the result or the process. While our collective experience may allow us to better predict what effect the error may have had on the trier of fact, that prediction is still no more than speculation.

If we were to apply the harmless error statute's plain language to this case, it would not appear that the error complained of resulted in a miscarriage of justice. The plaintiff was able to present evidence of the statistical anomaly and was **[**57]** able to argue its weight to the jury. The omitted testimony added little to the plaintiff's case, and the failure of Dr. Dildy to address the statistical anomaly may have been more damaging than what he would have said if the trial court had allowed the cross examination. Therefore, applying either the harmless error statute's plain language or the majority opinion's "more likely than not" harmless error test, our decision to affirm would be the same.

MAY ▾, C.J., concurs.

CONNER ▾, J., concurring specially.

I concur in the result, but I am unable to agree with receding from the position this court has previously taken on the test for harmless error in civil cases.

I agree that our supreme court has opined harmless error should be based on the effect of the error on the trier of fact. I concede in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), the supreme court established that in criminal cases, the burden of persuasion to obtain the verdict (beyond a reasonable doubt) is the same burden of persuasion in applying a harmless error analysis. I also concede there is an easy logic to the idea that in *all* cases the burden of persuasion to obtain a judgment should be the same burden of persuasion **[**58]** to reverse a judgment. That necessarily means there are three different tests or standards in determining if an error is harmless.[27]

FOOTNOTES

27 In criminal cases, the burden of persuasion is "beyond a reasonable doubt." In civil cases, there are two possible burdens of persuasion, depending on the type of case: "preponderance" (the majority speaks of "more likely than not") and "clear and convincing."

Judge Damoorgian ▾ hits the nail on the head when he points out one of the concerns about the notion of harmless error is the fear that its application will rely on the subjective viewpoint of a panel of appellate judges. I also agree with Judge Damoorgian ▾ that appellate judges are periodically called upon to apply the notion of a "miscarriage of justice" in deciding whether to grant or deny certiorari review. However, petitions for certiorari review are not as "routine" (numerically) as direct appeals. I also doubt there is much consensus among appellate judges on how to define or describe a "miscarriage of justice."

[*776] My real struggle with the majority opinion is this: identifying the perspective from which harmless error is to be assessed and the burden of persuasion for establishing whether error **[**59]** is harmless does not tell me much about what the actual standard is. The clearest statement in the majority opinion of the harmless error standard for civil cases is: "To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that *the error did not influence the trier of fact and thereby contribute to the verdict*." (Emphasis added.) That articulation suggests to me that the thought process for the appellate panel is to weigh and consider the *amount* of influence the error may have had on the trier of fact and to assess whether some tipping point was reached in which one can safely conclude "more likely than not" the error "contributed to the verdict." For me, this standard invites too much speculation and subjective analysis. Lawyers will have great difficulty advising clients about the likely outcome of an appeal where such standards are used.

As the majority points out, we are more tolerant of error when *the outcome* is whether someone should be paid money than when *the outcome* is whether someone should be deprived of liberty. That is as it should be. Thus, it seems reasonable to assume that in passing a harmless error **[**60]** statute the legislature appreciated the difference in *the outcome* between a civil case and a criminal case. If I am correct, there is no reason the judiciary needs to measure harmless error the same way for both types of cases. It is appropriate to protect the fairness of the fact-finding process *above* protecting the finality of a decision in criminal cases. I submit in civil cases it is more appropriate to protect the finality of a decision *above* protecting the fairness of the fact-finding process.

Focusing on the effect of the error on the trier of fact raises another concern in civil cases. Does

the application of the standard differ if the trier of fact is a judge instead of a jury? This concern is enhanced because more civil cases are tried nonjury than criminal cases. Focusing on the effect of the error on the trier of fact is really an exercise in divining whether the error may have influenced the trier of fact; and if so, was there enough influence to affect the trier of fact's decision. It would seem to me that my divining skills will be applied differently when the trier of fact is a jury as opposed to a judge.[28]

FOOTNOTES

28 Because judges are trained in the law they are less likely **[**61]** to be affected by error as fact-finders. Also, my assumption is that trial judges are less likely to be swayed by emotion and subjective factors.

Another problem I have with the majority's contention that in this district we have set the bar of harmful error too high for civil cases is that setting the bar too low is an affront to the integrity of the jury process and the decision rendered by six impartial persons selected by both sides to try the case. In civil cases, the appellant is unhappy with a jury decision and seeks a new decision by a new jury. If the rules regarding reversal required that the case be retried with the same evidence and the same arguments, minus the error, it is doubtful we would have as many appeals in civil cases as we do.

Instead, the appellant is seeking a second bite at the apple with a new jury, with the understanding that, having the benefit of a dry-run, the case will be presented in a different fashion. More often than not, the restructuring of evidence and arguments will have little connection to the error that caused the retrial. A "but for" **[*777]** analysis which focuses on whether the outcome would be the same with the original jury, without the error, gives **[**62]** honor to the original jury.

The majority quotes the supreme court in *DiGuilio*:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. [*Id.* at 1139.]

and a little later goes on to opine:

> Under the *DiGuilio* test, a judgment should be reversed, and a new trial granted, whether or not the outcome of that trial is likely to be different, whenever the appellate court believes there is a reasonable possibility that the error influenced the trier-of-fact and contributed to the verdict.
>
> The differences between a "correct result" ["but for"] test and an "effect on the fact finder" test are subtle but important. An "effect on the fact finder" test asks the appellate judge to look closely at the error and estimate its effect on the trier-of-fact. A "correct result" test asks **[**63]** the judge to look at everything but the error and guess whether the verdict in a trial without it would have been different. In short, one test focuses on process; the other on the end result. Moreover, a "correct result," or "but-for," test asks the judge to exclude the wrongly admitted evidence (or include the wrongly rejected evidence) and weigh the evidence anew—precisely what *DiGuilio* forbids. *See DiGuilio*, 491 So. 2d at 1136.

I submit the majority has read more into *DiGuilio* than what our supreme court said. Although the majority equates a "correct result" test with a "but for" test, I am not so sure our supreme court would do the same. What the supreme court made clear in *DiGuilio* is that the analysis of whether

the error affected the verdict is to be conducted from *the perspective of the jury* (would the jury have reached the same decision without the error), and not from *the perspective of the appellate panel* (would the appellate panel have reached the same decision the jury reached if the error is excluded). I agree our supreme court has rejected a "correct result" test in *DiGuilio*; I do not agree it rejected a "but for" test.

A "but for" analysis is consistent with *DiGuilio*. **[**64]** In *DiGuilio*, the supreme court said: "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." That is simply another way of saying the error is harmful if the appellate court cannot say beyond a reasonable doubt, "but for" the error, the verdict would not have been the same. Determining whether error "affected the verdict" is no different from determining whether the winning party would have gotten its verdict without the error.

A "but for" analysis of harmless error in civil cases makes the exercise of divining the influence of error on the trier of fact easier, regardless of the burden of persuasion and regardless of whether the trier of fact is a jury or a judge. It also comports more with the history of why the statute was enacted: to curb the application of an overly liberal standard for granting new trials. Also, a "but for" analysis makes it easier for lawyers to predict outcomes and advise clients. I contend that a "but for" **[*778]** analysis of harmless error is less prone to be criticized as too speculative and subjective.

If we are going to allow different standards for the application of harmless **[**65]** error depending on whether the case is criminal or civil, I am more comfortable with the more stringent "but for" test this district has adopted in civil cases because we are more tolerant of error in civil cases and because the stakes are different than criminal cases.[29] If this court is going to reformulate the harmless error test or standard to be applied to civil cases, I submit it should be this: "To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the decision of the trier of fact would have been the same without any influence of the error."[30]

FOOTNOTES

29 I agree that with a more stringent standard, there is the potential that lawyers will engage in "win at all cost" tactics because the likelihood of reversal is less. However, that type of improper lawyer conduct is better addressed by sanctions against the lawyer than by reconvening a new jury to try the case.

30 For civil cases in which the burden of persuasion is "clear and convincing" (such as Jimmy Ryce cases), my articulation would change the words "more likely than not" to "clear and convincing."

Undoubtedly, the majority will contend my articulation **[**66]** is too "result oriented," whereas the majority's articulation is more "process oriented."[31] The distinction between the two formulations can be described this way: I submit the majority's articulation will lead to more reversals because assessing "influence on the trier of fact" is expressed as establishing a negative ("error did not influence") whereas my articulation focuses on establishing a positive (the result would have been the same). Establishing a negative is always more difficult than establishing a positive. Protecting the fairness of the fact-finding process should prevail over protecting finality of a decision in criminal cases, and the appellee should have to establish a negative to avoid reversal. However, in civil cases, protecting finality of a decision should prevail over protecting the fairness of the fact-finding process, and the appellee should have to establish a positive.

FOOTNOTES

31 Both *DiGuilio* and the majority express the harmless error analysis in terms of whether the

error "contributed to the verdict." How does one determine that without being "result oriented?"

LEVINE, J., concurs.

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90.803 Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) SPONTANEOUS STATEMENT.—A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) EXCITED UTTERANCE.—A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.—

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.—Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) RECORDED RECOLLECTION.—A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with

knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) PUBLIC RECORDS AND REPORTS.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) RECORDS OF VITAL STATISTICS.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) ABSENCE OF PUBLIC RECORD OR ENTRY.—Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) RECORDS OF RELIGIOUS ORGANIZATIONS.—Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES.—Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) FAMILY RECORDS.—Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.—The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.—A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) STATEMENTS IN ANCIENT DOCUMENTS.—Statements in a document in existence 20 years or more, the authenticity of which is established.

(17) MARKET REPORTS, COMMERCIAL PUBLICATIONS.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) ADMISSIONS.—A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.—Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.—Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) REPUTATION AS TO CHARACTER.—Evidence of reputation of a person's character among associates or in the community.

(22) FORMER TESTIMONY.—Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSON OR DISABLED ADULT.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; ss. 20, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 4, ch. 85-53; s. 11, ch. 87-224; s. 2, ch. 90-139; s. 3, ch. 90-174; s. 12, ch. 91-255; s. 498, ch. 95-147; s. 1, ch. 95-158; s. 2, ch. 96-330; s. 1, ch. 98-2; s. 2, ch. 2003-259; s. 1, ch. 2013-98; s. 1, ch. 2014-200.

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Citation: 31 so 3d 873

*31 So. 3d 873, *; 2010 Fla. App. LEXIS 3342, **;*
35 Fla. L. Weekly D 618

JOHN HERNANDEZ, Appellant, v. STATE OF FLORIDA, Appellee.

No. 4D08-2872

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

31 So. 3d 873; 2010 Fla. App. LEXIS 3342; 35 Fla. L. Weekly D 618

March 17, 2010, Decided

SUBSEQUENT HISTORY: Rehearing denied by Hernandez v. State, 2010 Fla. App. LEXIS 6435 (Fla. Dist. Ct. App. 4th Dist., Apr. 27, 2010)

PRIOR HISTORY: [1]**
Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marc H. Gold, Judge; L.T. Case No. 06-20215 CF10A.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant sought review of a judgment from the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), which convicted him of and sentenced him for two counts of lewd or lascivious molestation and one count of lewd or lascivious exhibition.

OVERVIEW: Defendant argued that the trial court erroneously permitted the State to call a witness for the sole purpose of introducing otherwise inadmissible impeachment evidence, which highly prejudiced appellant. Upon review, the court found that the witness was unable, or unwilling, to attest to the accuracy of the taped conversation and thus, the State was not able to show it could introduce the document as a past recollection recorded under § 90.803 (5), Fla. Stat. (2008). The witness testified definitively that defendant denied abusing a victim, which directly conflicted with the conversation on the tape. However, a review of the witness' entire trial testimony reflected that it was useful only for the introduction of her prior inconsistent statements. Furthermore, the impeachment under § 90.608(1), Fla. Stat., was not of de minimis value to the State because none of the State's other witnesses had testified that defendant admitted to the allegations. Thus, the error was not harmless as the court could not say beyond a reasonable doubt that the admission of the tape, containing the witness' prior inconsistent statements, did not contribute to the jury's verdict.

OUTCOME: The court reversed the trial court's judgment and remanded the matter for a new trial.

CORE TERMS: tape, male, sexual contact, recollection, conversation, sorry, phone, touching, witness' testimony, breast, genital area, prior inconsistent statement, impeachment, lascivious, prosecutor, touched, inaudible, past recollection recorded, inadmissible, molestation, sentencing, recorded, want to know, psychologically, cousin, uncle, hear, hearsay rule, counts of lewd, sole purpose

LEXISNEXIS® HEADNOTES

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Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

Evidence > Hearsay > Exceptions > Recorded Recollection > Requirements

HN1 The standard of review on the admission of evidence is abuse of discretion as limited by the rules of evidence. § 90.802, Fla. Stat. (2008). Section 90.803(5), Fla. Stat. (2008), provides an exception to the hearsay rule when a witness cannot recall matters of which he or she previously had knowledge. If the proper foundation is laid, a tape-recorded statement may qualify as a recorded recollection. To be admitted into evidence, the past recollection recorded must be offered by the witness who is either devoid of a present recollection, or possessed of an imperfect present recollection and desires to use a memorandum of a past recollection. § 90.803(5). The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of making. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Recorded Recollection > Requirements

HN2 See § 90.803(5), Fla. Stat. (2008).

Evidence > Testimony > Credibility > Impeachment > Prior Inconsistent Statements

Evidence > Testimony > Credibility > One's Own Witnesses > Application > General Overview

HN3 Section 90.608(1), Fla. Stat., states that any party, including the party calling the witness, may attack the credibility of a witness by introducing statements of the witness which are inconsistent with the witness's present testimony. However, there is a risk of abuse where a prosecutor calls a witness who has previously given a statement implicating the defendant but who has since repudiated that statement. Where a prosecutor knows that the witness' testimony at trial will be favorable to the defendant but, nonetheless, calls the witness for the purpose of impeaching her with her prior statement, the practice may be considered abusive because there is no legitimate forensic purpose in calling a witness solely to impeach him. Generally if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Testimony > Credibility > Impeachment > General Overview

HN4 In determining whether a party calls a witness for the primary purpose of impeachment, courts may consider (1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of de minimis substantive value. More Like This Headnote

Evidence > Testimony > Credibility > Impeachment > Prior Inconsistent Statements

HN5

Application of the mere subterfuge or primary purpose doctrine focuses on the content of the witness's testimony as a whole. If the witness's testimony is useful to establish any fact of consequence significant in the contest of the litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to. The pivotal question is whether the party is calling a witness with the reasonable expectation that the witness will testify to something helpful to the party's case aside from the prior inconsistent statement. More Like This Headnote |
Shepardize: Restrict By Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions

HN6 The pertinent question in a harmless error analysis is not the sufficiency or quality of the remaining, properly admitted evidence; rather, it is whether there is a reasonable possibility that the error affected the verdict. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

HN7 Sexual contact is not defined in the applicable statutes. However, Florida courts have upheld sexual contact victim injury points in instances where the offender touched clothed sexual parts of the victim. More Like This Headnote

COUNSEL: Samuel R. Halpern, Fort Lauderdale, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Melanie Dale Surber, Assistant Attorney General, West Palm Beach, for appellee.

JUDGES: POLEN, J. WARNER and STEVENSON, JJ., concur.

OPINION BY: POLEN

OPINION

[*875] POLEN, J.

Appellant, John Hernandez, appeals his convictions and sentences for two counts of lewd or lascivious molestation and one count of lewd or lascivious exhibition. First, he contends that the trial court erroneously permitted the State to call witness Sherill Hernandez for the sole purpose of introducing otherwise inadmissible impeachment evidence, which highly prejudiced appellant. Second, appellant claims error by the trial court in assessing points for victim contact pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), where the verdict form did not have a separate interrogatory for sexual contact. Although we must reverse for a new trial on the first issue, we also address appellant's sentencing issue, should this matter arise again.

Appellant was charged in Counts 1 and 2 with the lewd or lascivious touching of P.M.'s **[**2]** breast/genital area, or the clothing covering the breast/genital area, on one or more occasions, between October 31, 1999 and March 31, 2004. Count 3 alleged that on one or more occasions during the same time frame, appellant exposed his genitals to P.M. in a lewd or lascivious manner. P.M. was twelve years old when the alleged conduct began.

Appellant's wife, Sherill Hernandez, was P.M.'s cousin. P.M. referred to Sherill and appellant as aunt and uncle. During the time period in question, P.M. and her two younger sisters would sleep over at the Hernandez home every other weekend or so. It was during these weekends that the alleged molestation occurred.

P.M. described two incidents. In the first, she was sleeping in her cousin Jonathan's bedroom on the floor. Appellant entered the room and asked P.M. if she was awake and wanted to watch a movie with him in the living room. P.M. said okay and went into the living room with appellant. When she got cold, appellant put her on his lap. Appellant began to push her down onto his lap and began to grind his penis against her "butt" and genital area. Appellant then lowered his pants, unbuttoned P.M.'s "jumper dress" and continued to grind against **[**3]** her. P.M. still had her shirt and underwear on. She could see appellant's penis. When P.M. cried, appellant stopped and put her back in the other room. Another time, appellant entered the bedroom where P.M. slept, picked her up off the bed, laid her down on the floor and then laid on top of her. Appellant then began to grind against P.M., kiss her neck and touch her breast. Initially, P.M. testified that appellant touched her "naked" breast. Later, she testified that appellant never touched her underneath her clothes, although he attempted to do so.

The incidents occurred in the early morning hours when the house was dark and the rest of the family was asleep. P.M. said she screamed during the incident(s), but "never . . . to the point where the whole house could hear [her]." The incidents all blurred together and P.M. did not know how many times appellant did this to her. P.M. did not make the allegations until she was eighteen years old, two years after the incidents had stopped. She first told her cousin, Sashana, [1] and then later, her mother, while in the car with Sashana. Upon hearing the allegations, P.M.'s mother drove straight over to the Hernandez residence. When appellant **[**4]** came to the door, he got down on his **[*876]** knees, said, "I'm sorry," and asked for forgiveness. However, P.M.'s mother did not confront appellant with any specific allegations.

FOOTNOTES

1 Sashana was not called to testify at trial by either party.

Later that day, P.M. went to the police station where she agreed to make a recorded phone call to appellant. The tape began with a conversation between appellant and P.M., and ended with a conversation between P.M. and Sherill Hernandez. Initially, the parties agreed that only the conversation between P.M. and appellant would be admitted as evidence. That section of the tape, which follows, was published at the end of the State's case, and without objection:

Unknown male: Hello.

P.M.: Hey, is Uncle John there?

Unknown male: One second.

P.M.: All right.

Male: Hello.

P.M.: Hello.

Male: Yeah.

P.M.: John?

Male: Yes.

P.M.: It's P.M.

Male: Hi, P.M.

Male: Forgive me.

P.M.: I can't.

Male: Huh?

P.M.: I can't. I just want to know why. Hello.

Male: I'm sorry, P.M.

P.M.: Uncle John, why?

Male: Can you, can you just forgive me?

P.M.: No, I just want to know why you were touching me? Why did you do this? Why?

Male: (No audible response).

P.M.: Can you please answer me? Hello. Answer me.

Male: **[**5]** I have to go.

P.M.: No, you don't have to go.

Male: I'm sorry, P.M.

P.M.: Hello.

Male: I'm sorry.

P.M.: I deserve the right to know why.

(Thereupon the tape was stopped).

After appellant spoke to P.M., the phone was passed to Sherill Hernandez. Sherill and P.M. then had a conversation, in which Sherill indicated that appellant had confessed to her.

The State called Sherill Hernandez over appellant's objection that the witness was being called for the sole purpose of impeaching her with the transcript of the controlled call. The defense advised that the witness had told defense counsel she was going to deny that appellant had ever confessed to her. The prosecutor responded: "I don't know what she's going to come in and say. My only good faith basis is that she is on tape making statements that her husband has admitted this molestation to her specifically." Defense counsel noted that the State had never deposed the witness.

Before Sherill testified, a proffer was taken and the tape was played for her with the aid of a transcript. Sherill recognized her voice on the tape and recalled part of the phone call, but could not understand what she was saying because "it was very difficult to hear."

Later, **[**6]** when she testified before the jury, Sherill denied that appellant had admitted to molesting P.M. and said that neither the tape nor the transcript refreshed her memory. When asked whether she recalled telling P.M. that appellant told her he did these things because he "wasn't psychologically well," Sherill said: "I may have said it, I don't remember." She later said, "he never said that." Sherill said she must have been referring to the person that molested her (Sherill) as a child. After the tape was played for her **[*877]** again, outside of the jury's presence, Sherill testified that hearing her voice did not refresh her recollection about what was said in the conversation.

After extensive argument and objections, the court ruled that Sherill and P.M.'s taped

conversation would be admitted as past recollection recorded. Appellant objected to the tape being admitted under that exception to the hearsay rule, citing a lack of predicate or foundation.

After Sherill's testimony, the conversation in its entirety was published to the jury:

Female: Hello.

P.M.: Hello?

Female: Hello.

P.M.: Hello?

Female: P.M.

P.M.: Hi.

Female: I'm sorry, baby.

P.M.: No, no, no. From when I was little. I was twelve years old **[**7]** and you knew.

Female: I did not know, I had no idea.

P.M.: He's your husband.

Female: I did not know.

P.M.: I'm your family, not him, me.

Female: I know.

P.M.: I'm blood, you're married to him.

Female: I know baby. I did not know, P.M. I did not know. I'm so sorry.

P.M.: I will never forgive nobody, never. The stuff I've been through, never. Can you please tell me, Uncle John?

Female: (Inaudible).

P.M.: Is he on the phone?

Female: No, he's not in the room.

P.M.: Can you just put him on the phone? I just want to know why. Hello.

Female: P.M.

P.M.: I just want to know why he touched my vagina, my breasts and he made me sit on him, can you, just please. I'm at an age, I'm grown, can somebody please --

Female: I know, I asked him why he did all of that, and that's what he said, psychologically he wasn't well.

P.M.: Well, him and his psychological problems need to tell me why he did this to me.

Female: P.M. he said psychologically he wasn't well and (inaudible) he's sorry.

P.M.: Auntie, I have to talk to him, please.

Female: (Inaudible) P.M., I'm sorry, I had no -- if I knew I would have done the same thing, some relative or cousin did the same thing, I understand what you're going through.

P.M.: Okay, Auntie, **[**8]** are you going to put him on the phone?

Female: Are you tape recording this, P.M.?

P.M.: No.

Female: Where are you calling from?

P.M.: I'm at my friend's house.

Female: (Inaudible) I know, I just (inaudible) I'm in so much pain right now. Travis, please don't pick up the phone.

P.M.: Well, I tried, all I wanted was an answer, so, I --

Female: I know --

P.M.: I don't want to hear it from you, you didn't do it, he did it, I wanted to hear it from him. Well, I got to go.

Female: P.M.

P.M.: I'm sorry, I got to go.

Female: P.M. P.M.

P.M.: Bye.

(Thereupon, the tape was stopped.)

Appellant argues that the trial court reversibly erred in allowing the State to call **[*878]** Sherill Hernandez as a witness for the sole purpose of impeaching her with this inadmissible hearsay evidence. The State responds that the taped statement was admissible as a past recollection recorded, and alternatively, any error was harmless. We agree with appellant and reverse.

HN1 The standard of review on the admission of evidence is abuse of discretion as limited by the rules of evidence. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). Unless it falls within a statutory exception, hearsay evidence is inadmissible. *See* § 90.802, Fla. Stat. **[**9]** (2008).

Section 90.803(5), Florida Statutes (2008), provides an exception to the hearsay rule when a witness cannot recall matters of which he or she previously had knowledge. [2] If the proper foundation is laid, a tape-recorded statement may qualify as a recorded recollection. *See Montano v. State*, 846 So. 2d 677, 680-81 (Fla. 4th DCA 2003). To be admitted into evidence, the past recollection recorded must be offered by the witness who is either devoid of a present recollection, or possessed of an imperfect present recollection and desires to use a memorandum of a past recollection. *See Kimbrough v. State*, 846 So. 2d 540, 543 (Fla. 4th DCA 2003); § 90.803(5). *"The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of making." Kimbrough*, 846 So. 2d at 543 (citing J. Wigmore, Evidence §§ 734, 746(2) (Chadbourne rev. 1970)); *see also Montano*, 846 So. 2d at 681-82 (witness's tape-recorded statement given to police shortly after criminal incident was

improperly admitted under recorded recollection exception to hearsay rule where witness did not acknowledge its accuracy at trial).

FOOTNOTES

2 HN2 (5) RECORDED RECOLLECTION. A memorandum or record **[**10]** concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

§ 90.803(5), Fla. Stat. (2008).

Here, Sherill Hernandez was unable, or unwilling, to attest to the accuracy of the taped conversation. As such, the State was not able to show it could introduce the document as a "past recollection recorded." Sherill testified definitively that appellant denied abusing P.M. This directly conflicts with the conversation on the tape. Sherill also denied that appellant had offered an explanation to her for abusing P.M., i.e., that he was not mentally or psychologically well. She testified that the tape did not refresh her recollection.

HN3 Section 90.608(1), Florida Statutes, states that "[a]ny party, including the party calling the witness, may attack the credibility of a witness by . . . [i]ntroducing statements **[**11]** of the witness which are inconsistent with the witness's present testimony." However, the supreme court in *Morton v. State*, 689 So. 2d 259 (Fla. 1997), *receded from on other grounds, Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), has recognized the risk of abuse where a prosecutor calls a witness who has previously given a statement implicating the defendant but who has since repudiated that statement. *Bateson v. State*, 761 So. 2d 1165, 1169 (Fla. 4th DCA 2000). "[W]here a prosecutor *knows* that the witness' testimony at trial will be favorable to the defendant but, nonetheless, calls the witness for the purpose of impeaching [her] with [her] prior statement, the practice may be **[*879]** considered abusive because 'there is no legitimate forensic purpose in calling a witness solely to impeach him.'" *Id.* (emphasis added.) Recognizing that a single rule could not be created to encompass all of the circumstances in which a party will seek to impeach her own witness, the court stated: "Generally . . . if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded." *Morton*, 689 So. 2d at 264.

HN4 In **[**12]** determining whether a party calls a witness for the primary purpose of impeachment, courts may consider "(1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of *de minimis* substantive value." *Senterfitt v. State*, 837 So. 2d 599, 600 (Fla. 1st DCA 2003).

Recently, this court adopted the Third District's expanded explanation of the "primary purpose" analysis in *State v. Richards*, 843 So. 2d 962 (Fla. 3d DCA 2003), which noted that the witness's other testimony must be useful to prove a significant fact in the litigation:

> HN5 Application of the "mere subterfuge" or "primary purpose" doctrine focuses on the content of the witness's testimony as a whole. If the witness's testimony is useful to establish any fact of consequence significant in the contest of the litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to. In the words of one commentator, the pivotal question is whether the "party [is] calling a witness with the reasonable expectation that the witness will testify [to] something helpful **[**13]** to the party's case aside from the prior inconsistent statement."

Ruff v. State, No. 4D07-778, 31 So. 3d 833, 2010 Fla. App. LEXIS 1607, 2010 WL 532790, at *4 (Fla. 4th DCA Feb. 17, 2010) (quoting *Richards*, 843 So. 2d at 965 (emphasis omitted) (quoting 1 *McCormick on Evidence* § 38, at 142-43 (John W. Strong ed., 5th ed. 1999)).

In the instant case, a review of Sherill's entire trial testimony reflects that it was useful only for the introduction of her prior inconsistent statements. First, we find the absence of the "surprise" factor. The State had never deposed Sherill, and the record reflects that the prosecutor had not even spoken with the witness prior to trial. Moreover, defense counsel specifically advised the State and trial court that Sherill had told defense counsel she was going to deny that appellant ever admitted to the allegations or that he had offered an explanation for doing so. During the initial proffer, the witness recognized her voice on the tape and recalled part of the phone call, but could not make out what she was saying. At the very least, then, the State should have been alerted to the possibility that Sherill's trial testimony would be favorable to appellant. The State could and should have requested **[**14]** a brief recess to interview or depose the witness. Sherill's testimony did, in fact, affirmatively harm the prosecution, because it directly opposed the point the State was trying to prove; namely, that appellant had confessed to his wife. The impeachment was not of *de minimis* value to the State because none of the State's other witnesses had testified that appellant admitted to the allegations. The only other evidence Sherill offered concerned the relationship between the families, appellant's age, and that P.M. was often an overnight houseguest in the Hernandez home. This testimony was either cumulative to that of the other witnesses or undisputed. "Paraphrasing *McCormick*, the prosecutor did not call [Sherill Hernandez] with any reasonable expectation that she **[*880]** would testify to something helpful to his case, aside from the prior inconsistent statement." *Ruff*, 2010 Fla. App. LEXIS 1607, 2010 WL 532790, at *4.

We cannot say beyond a reasonable doubt that the admission of the tape, containing Sherill's prior inconsistent statements, did not contribute to the jury's verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). This is so despite the trial court's cautionary instruction(s). [3] HN6 "The pertinent **[**15]** question in a harmless error analysis is not the sufficiency or quality of the remaining, properly admitted evidence; rather, it is 'whether there is a reasonable possibility that the error affected the verdict.'" *Chavez v. State*, 25 So. 3d 49, 54 (Fla. 1st DCA 2009) (citing *DiGuilio*, 491 So. 2d at 1139); *see also Ventura v. State*, No. SC08-483, 29 So. 3d 1086, 2010 Fla. LEXIS 216, 2010 WL 546760, at *3 (Fla. Feb. 18, 2010) (reiterating that the harmless error test is "*not* a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, *or even an overwhelming evidence test*." (citing *DiGuilio*, 491 So. 2d at 1139).

FOOTNOTES

[3] The trial court gave the jury a limiting instruction both at the time the tape was played, and later, in the final charge to the jury.

The subject conversation revealed the only admission of guilt by appellant, gave credence to the victim's testimony, and provided an explanation for appellant's non-specific requests for forgiveness, first to P.M.'s mother and later, to P.M. It was highly damaging and prejudicial -- particularly, where the victim did not report the alleged conduct until two years after it had stopped and the State presented **[**16]** no physical evidence or corroborating witness testimony.

For the foregoing reasons, we reverse for a new trial.

We now comment on the sentencing issue in the event it becomes an issue following remand.

During sentencing, the defense objected to the points assessed for victim contact, pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Counsel argued that the sexual contact points should not be included in the scoresheet calculation because the

verdict form did not have a separate interrogatory for sexual contact. The State successfully argued that the victim contact inheres in the verdict and no separate jury determination was required. Accordingly, the trial court assessed sexual contact points for the two counts of lewd or lascivious molestation.

Appellant argues that sexual contact did not inhere in the verdict because the testimony was ambiguous as to whether appellant touched the clothing covering the breast or genital area or the flesh itself. Appellant correctly asserts that HN7 sexual contact is not defined in the applicable statutes. However, our courts have upheld sexual contact victim injury points in instances where the offender touched *clothed* sexual parts of the victim. *See* **[**17]** *Altman v. State*, 852 So. 2d 870 (Fla. 4th DCA 2003) (holding that appellant's act of lying on top of the victim with his clothed genitals pressed against hers and "humping" her constituted sexual contact for which victim injury points were appropriately scored); *see also Fredette v. State*, 786 So. 2d 27, 28 n.2 (Fla. 5th DCA 2001) (holding that sexual contact includes touching a child's vaginal area, and opined that this would constitute sexual contact even if the touching was over the child's clothing); *Louis v. State*, 764 So. 2d 930 (Fla. 4th DCA 2000) (holding that touching the victim's chest through her shirt, along with touching her stomach and genital area, involved sexual contact for which victim **[*881]** injury points were properly scored); *State v. Milanes*, 762 So. 2d 572, 573 (Fla. 5th DCA 2000) ("victim injury points can be assessed when the accused is adjudicated guilty of fondling the victim"); *Mackey v. State*, 516 So. 2d 330, 330-31 (Fla. 1st DCA 1987) (affirming victim injury points for sexual contact where defendant fondled a thirteen-year-old boy by touching him above the crotch).

We therefore find the sentencing issue to be without merit.

Reversed and Remanded.

WARNER and STEVENSON, **[**18]** JJ., concur.

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The 2014 Florida Statutes

Title VII
EVIDENCE

Chapter 90
EVIDENCE CODE

View Entire Chapter

90.613 Refreshing the memory of a witness.—When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 491, ch. 95-147.

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Thomas G. GARRETT and Willie Mae Garrett, husband and wife, Petitioners, v. MORRIS KIRSCHMAN AND COMPANY, INC., a corporation, and Continental Assurance Company, a corporation, Respondents

No. 47236

Supreme Court of Florida

336 So. 2d 566; 1976 Fla. LEXIS 4467

June 9, 1976

SUBSEQUENT HISTORY: [**1] Rehearing Denied September 21, 1976.

COUNSEL: Lefferts L. Mabie, Jr., of Levin, Warfield, Middlebrooks, Graff, Mabie, Rosenbloum & Magie, Pensacola, for Petitioners.

Robert P. Gaines, of Beggs & Lane, Pensacola, for Respondents.

JUDGES: Hatchett, J. Overton, C.J., and Roberts, Adkins, England and Sundberg, JJ., concur. Boyd, J., dissents.

OPINION BY: HATCHETT

OPINION

[*567] Petitioners were the plaintiffs in an action brought against respondents on account of an automobile accident in which Mr. Garrett was injured. [1] Mrs. Garrett sought compensation for loss of "the services, society and consortium of her husband" (R 2) attributable to the accident. Because liability was conceded, the jury had only the question of damages to resolve. At the trial, petitioners' counsel undertook to prove, *inter alia*, the extent of medical expenses incurred in consequence of the accident, and diminution of Mr. Garrett's income as a result of his injuries. Judgment was entered in favor of each petitioner.

1 Defendants on a separate claim tried at the same time did not appeal.

[**2] On appeal to the District Court of Appeal, First District, that court "remanded for a new trial on the issue of damages," *Morris Kirschman & Co. v. Garrett, 308 So.2d 575 (1975)*, with one judge concurring specially in the judgment. The majority concluded that copies of income tax forms which had been filled out by Mr. Garrett's employer, should not have been used to refresh Mr. Garrett's recollection, and should not have come into evidence. In addition, the District Court concluded that the burden of proving the necessity and reasonableness of Mr. Garrett's medical expenses was not met. We granted certiorari on the basis of conflict between the District Court's decision in this case and other Florida appellate decisions, among which are *United Sand & Material Corp. v. Florida Indus. Com'n, 201 So.2d 451 (Fla.1967)*; *Shaw v. Puleo, 159 So.2d 641 (Fla.1964)*; *Lindberg v. State, 134 Fla. 786, 184 So. 662 (1938)*; *Atlanta & St. A.B. Ry. Co. v. Ewing, 112 Fla. 483, 150 So. 586 (1933)*; *Volusia County Bank v. Bigelow, 45 Fla. 638, 33 So. 704 (1903)*; *Jenkins v. State, 31 Fla. 196, 12 So. 677 (1893)*; *King v. Califano, 183 So.2d 719* (Fla.App. 1st, 1966); [**3] *Lobree v. Caporossi, 139 So.2d 510* (Fla.App. 2nd, 1962); and *Chaudoin v. State, 118 So.2d 569* (Fla.App. 2nd, 1960).

[*568] We agree with the District Court that the portion of the judgment based on the verdict in favor of Mr. Garrett must be reversed because of the admission into evidence, over objection on hearsay grounds, of copies of Mr. Garrett's employer's tax returns. There was no requirement to lay any predicate, however, for the use of those documents to revive present recollection. Before the papers were offered into evidence, plaintiffs' counsel furnished them to Mr. Garrett while he was on the witness stand:

By Mr. Mabie:

Q. Would you tell us what your - first of all let me hand you this and ask you if this is a copy of your form 1099s, your United States Information Return for the calendar years nineteen seventy, and nineteen seventy-one, and nineteen seventy-two showing what your total income was for each of those respective years from ABC Auto Sales?

A. Yes, sir.

Q. And what was your income in nineteen seventy, the year before the accident?

MR. GAINES: We object to that on this record, Your Honor, on the grounds that this is a self [**4] serving declaration which he [2] filed with the United States Government, and if he is going to testify from the records, it should be the original records.

THE COURT: Objection overruled.

A. In nineteen seventy I made sixteen thousand two hundred and sixty-two dollars and seventy cents.

MR. MABIE:

Q. And what in nineteen seventy-one?

MR. GAINES: Same objection, Your Honor.

THE COURT: Objection overruled.

A. Seven thousand nine zero one forty-eight.

MR. MABIE:

Q. And what was your income in nineteen seventy-two?

MR. GAINES: Same objection, Your Honor.

THE COURT: Overruled.

A. Six thousand six hundred and thirty-six dollars and forty-three cents.

Assuming for purposes of decision that the witness testified from present recollection, [3] the trial court correctly overruled defense counsel's objection. The use of copies of tax returns to stimulate and revive an independent recollection has been specifically approved by other courts, *Freehill v. De-Witt County Service Co., 125 Ill.App.2d 306, 261 N.E.2d 52 (1970)*; *J. A. Robinson Sons, Inc. v. Wigart, 420 S.W.2d 474 (Tex.Civ.App.1967)*, and is fully consistent with the general rules governing [**5] the revival of a recollection. See 3 Wigmore on Evidence § 758 *et seq.* (1970); Maguire & Quick, *Testimony: Memory and Memoranda*, 3 How.L.J. 1 (1957). In requiring "a foundation" for such use, the District Court stated a rule contrary to the law of Florida as laid down in *United Sand & Material Corp. v. Florida Indus. Com'n, supra; Atlanta & St. A.B. Ry. Co. v.* [*569] *Ewing, supra; Jenkins v. State, supra; King v. Califano, supra*; and *Chaudoin v. State, supra.*

2 The tax forms were filled out not by the witness himself but by the witness' employer.

3 Respondents maintain that the witness read from the forms at trial, which they assert to be equivalent to the introduction of the forms themselves into evidence. Petitioners, who do not specifically deny that the witness read his answers from the forms, argue that the record is insufficient to show that the witness did not testify on the basis of an independent recollection, revived by the forms. Petitioners take the position that this ambiguity in the record ought to be resolved against the party seeking to overturn the judgment. We need not decide the question, in light of the fact that the forms themselves were admitted into evidence, later in the trial.

[**6]

When a writing is used only to revive present recollection, it need not have been written by the witness himself. *Chaudoin v. State, supra* ("no rule of evidence . . . prohibits a witness from referring to notes made by another to refresh his memory." At 571-572). A paper used to revive present recollection does not have to be an original. *Davis v. State, 47 Fla. 26, 36 So. 170 (1904)*; *King v. Califano, supra; State v. Liston, 18 Or.App. 26, 523 P.2d 609 (1974)*. In many jurisdictions it is immaterial when the writing was made, if it is used only to elicit present recollection. *Gauthier v. State, 28 Wis.2d 412, 137 N.W.2d 101 (1965) cert. den., 383 U.S. 916, 86 S. Ct. 910, 15 L. Ed. 2d 671 (1966)*; *Smith v. Bergmann, 377 S.W.2d 519 (Mo.App.1964)*; *Carter v. Carter, 187 Kan. 74, 353 P.2d 499 (1960)*; *Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959), cert. den. 361 U.S. 930, 80 S. Ct. 372, 4 L. Ed. 2d 354 (1960)*. But cf. *Great Atlantic & Pacific Tea Co. v. Nobles, 202 So.2d*

603 (Fla.App. 1st Dist., 1967). As a corollary to the rules allowing such wide latitude in the choice of writings as mnemonic aids, the writings used to prompt recollection [**7] are not necessarily admissible in evidence themselves. If a writing is admissible independently, its use to spur a witness' memory does not disqualify it, but it cannot come into evidence on the coattails of the testimonial recollection it sparks.

It is the witness' testimony as to the substance of his recollection which constitutes the evidence, when a writing revives present recollection. A writing may serve to jog a witness' memory and also be admissible on some independent ground. But no such independent ground was established, in the present case, when the tax forms were physically introduced in evidence, over respondents' hearsay objection. [4] The writing on the tax forms was the work not of the witness but of another. Insofar as was shown at trial, the forms are simply a writing in which Mr. Garrett's employer, Mr. Huggins, recites what he paid Mr. Garrett. The unverified writing of a third person, like the ordinary speech of a third person, is hearsay. *Pickrell v. State, 301 So.2d 473* (Fla.App. 2nd, 1974); *Bowen v. Seaward Dredging Corp., 242 So.2d 151* (Fla.App. 3rd, 1970); *Smith v. Frisch's Big Boy, Inc., 208 So.2d 310 (Fla.App. 2nd 1968).*

4 (CONTINUED) DIRECT EXAMINATION BY MR. MABIE:

> Q. Mr. Garrett, I'm trying to recall exactly where we were when you came down from the stand to avoid repeating it. I had asked you about the figure which represented your earned income from the years nineteen seventy and nineteen seventy-one and nineteen seventy-two, but I haven't asked you about nineteen seventy-three. Is that a copy of your W-2, form 1099 showing your income from ABC Motors, your employer, for this last year, nineteen seventy-three?
>
> A. Yes, sir.
>
> Q. And what is the amount that you earned in nineteen seventy-three?
>
> A. Sixty-nine sixty-six thirty.
>
> MR. MABIE: Your Honor, we offer all four of these into evidence.
>
> THE COURT: That will be Exhibit Ten.
>
> MR. GAINES: We have the same objection, Your Honor, that they are hearsay.
>
> THE COURT: Objection overruled.

[**8] In order to be admissible, [5] such a writing must be shown to fall under an exception to the general rule excluding hearsay from evidence. Although the forms Mr. Huggins filled out were printed by the government, they are not official records for that reason. [*570] If these forms were filled out in the ordinary course of business, it was open to the plaintiffs' counsel to establish that fact, if he could, and bring them within the business records exception. It is immaterial that the documents could have been shown to be within an exception to the rule disallowing hearsay, if no foundation was in fact made.

5 Because the contents of a writing which is consulted during testimony bears on the witness' credibility, opposing counsel may "examine the notes to which the witness referred in giving his testimony so that . . . repeated reference . . . to purported recorded notes is not a device employed to deceive the jury," *Allen v. State, 243 So.2d 448, 450* (Fla.App. 1st Dist., 1971), and it is open to *opposing counsel* to introduce such notes. Notes relied on to revive present recollection are not admissible, however, for the purpose of bolstering the credibility of the recollection they spark.

[**9] The petitioners cite *Jenkins v. State, 31 Fla. 196, 12 So. 677 (1893)* for the proposition that a writing is admissible in evidence where "no other use appears to have been made of such a memorandum book at the trial but to refresh the memory of the witness to whom it belonged in giving his testimony." *12 So. at 678.* Unlike the tax forms in the present case, the writing in *Jenkins* was the work of the witness whose memory was refreshed. It is not clear in the *Jenkins* case whether an adequate foundation had been laid for the "memorandum book" at issue there, so as to qualify it as past recollection recorded. [6] Assuming no such foundation was laid, the decision in *Jenkins* lends some support to petitioners' contention, but has been implicitly overruled on this point by cases decided in this century. *E.g., United Sand & Material Corp. v. Florida Indus. Com'n, supra* (although "the original notes, memorandum or other document made contemporaneously with or soon after a

transaction or event may be used by a witness . . . such a memorandum is not admissible as substantive evidence." At 453.) If counsel had only to show a writing to a witness, ostensibly in hopes of [**10] evoking some recollection, in order to render the writing admissible in evidence, the hearsay rule could be circumvented, simply by reducing hearsay to writing for tendering to the witness. In this fashion, hearsay could be hoisted by its own bootstraps to the status of competent evidence.

> 6 When a witness identifies as such a writing made contemporaneously (or nearly so) with events as to which testimony is elicited, and testifies that he knew at the time it was written that it was accurate, he incorporates into his testimony by reference the record of past recollection. On this basis, the writing becomes admissible since it is supported by the witness' oath, and he is available for cross examination. If the writing is by another, it may be admitted notwithstanding the rule against hearsay. As with any other exception to the hearsay rule, however, it is necessary that the predicate be established for exemption from the rule.

Conceding *arguendo* that the tax forms were hearsay and improperly admitted [**11] in evidence, petitioners argue that the error was harmless, because the forms were cumulative to Mr. Garrett's testimony. We reject the contention that this error was harmless. In fixing damages, the jury very likely took into account the difference between Mr. Garrett's earnings before the accident and his earnings afterwards. Aside from the forms, the only evidence as to Mr. Garrett's income after the accident was his own testimony, which was prompted by the tax forms. Petitioners' harmless error contention is nothing other than a variation on their bootstrap argument. Under the view petitioners urge, any writing would be admissible so long as a witness had consulted it in the course of his testimony.

In order to hold that it was harmless error to admit the forms themselves into evidence, because the forms were cumulative to testimony which they evoked, we would necessarily carve a broad exception to the hearsay rule, as a practical matter. We cannot approve an application of the harmless error statute which would have precisely the same effect as a new exception to the hearsay rule, permitting counsel to offer writings into evidence, merely because his witness had used them [**12] to revive present recollection.

As an additional ground [7] for reversal, the District Court asserted that the plaintiffs, [*571] petitioners here, failed "to prove the necessity and reasonableness of medical bills," citing *Shaw v. Puleo, supra* and *Schmidt v. Tracey, 150 So.2d 275* (Fla.App. 2nd, 1963). In *Schmidt v. Tracey, supra*, the Second District upheld a jury's award of damages, against the plaintiff's argument on appeal that her judgment was less than what she was out of pocket for medical bills. In *Shaw v. Puleo, supra*, this Court quashed an opinion of the First District which had reversed the circuit court judgment for supposed inadequacy of the damages. These cases illustrate appellate courts' traditional reluctance to overturn jury verdicts.

> 7 The respondents' entire argument on this point, as set forth in their brief at pp. 11 and 12, is, as follows:
>
> > Dr. Olsen [a treating physician] was not called as a witness. There was no testimony from anyone else as to the reasonableness of his bill. The only testimony which related it to the collision was that of Mr. Garrett. There was no authentication of the charges shown on the bill from the pharmacy as being reasonable or related to the accident except the testimony of Mr. Garrett.
> >
> > In admitting these documents into evidence as plaintiff's exhibit 2 (R 45) and exhibit 8 (R 51), the trial judge was apparently following the same rule he applied in admitting plaintiff's exhibit 10 - any document is admissible into evidence if it appears to have some relevance to the case. For the reasons stated in our argument of points 1 and 2, the admission of these documents into evidence was error. The District Court of Appeal, First District, was correct in so holding.

[**13] Here respondents' two objections at trial were to the introduction, respectively, of a physician's bill and of a pharmacist's bill, totaling $132.60, on the ground that Mr. Garrett's testimony alone could not suffice to show that they represented reasonable and necessary expenses. [8] Expert testimony was not required in order to render these medical bills admissible in evidence. Mr. Garrett's testimony made it a question for the jury to decide, under proper instructions, whether these bills represented reasonable and necessary medical expenses. Respondents made no objection to the jury charges as to

reasonableness and necessity of medical expenses. A reversal of the portion of the judgment in favor of Mr. Garrett would not have been justified, if the hearsay rule had not been violated, when the tax forms were introduced.

8 At p. 12 of respondents' brief counsel argues:

> The only testimony which related [Dr. Olsen's bill] to the collision was that of Mr. Garrett [who also testified that the bill had been paid.] There was no authentication of the charges shown on the bill from the pharmacy as being reasonable or related to the accident except the testimony of Mr. Garrett.

[**14] Although a single judgment effectuated the verdict in favor of the Garretts, the elements of Mr. Garrett's claim for damages are different from the elements of Mrs. Garrett's claim. The trial judge drew this distinction by stating damages separately in the judgment, and when he instructed the jury, as follows:

> In connection with Mr. Garrett's cases, you should take into consideration, the reasonable value of expense of medical treatment and care necessary or reasonably obtained by him in the past or to be so obtained in the future, any earnings or work time lost in the past or any loss of ability to earn money in the future should also be considered.
>
> As to the wife's claim, that is Mrs. Garrett, you should take into consideration any loss by reason of her husband's injury of his services, comfort, society and attentions in the past and in the future.

The hearsay evidence which was improperly admitted went to the issue of "earnings or work time lost . . . or . . . loss of ability to earn." The inadmissible evidence pertained exclusively to Mr. Garrett's claim. The District Court found no impropriety of any kind in the evidence supporting the judgment in favor [**15] of Mrs. Garrett, nor do we. Respondents do not argue that the verdict in favor of Mrs. Garrett rests on unlawful evidence, or that any procedural irregularity at trial affected it. Accordingly, there is no basis [9] on [*572] which to disturb the trial court's judgment as to Mrs. Garrett.

9 In this Court, respondents' only argument that the verdict in favor of Mrs. Garrett should not stand is that the verdict in her favor, as well as the verdict in favor of her husband "are clearly grossly excessive." Brief of Respondents, p. 13. We are unwilling to reweigh the evidence and substitute for the jury's verdict our own monetary estimate as to Mrs. Garrett's damages. *Shaw v. Puleo, supra; Schmidt v. Tracey, supra.*

The decision of the District Court of Appeal, First District, is approved in part and quashed in part, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

OVERTON, C.J., and ROBERTS, ADKINS, ENGLAND and SUNDBERG, JJ., concur.

BOYD, J., [**16] dissents.

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Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.610 Conviction of certain crimes as impeachment.—

(1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

(2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

(3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; ss. 16, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 489, ch. 95-147.

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*573 So. 2d 87, *; 1991 Fla. App. LEXIS 10, **;*
16 Fla. L. Weekly D 105

MARSHALL LEE GORE, Appellant, v. THE STATE OF FLORIDA, Appellee

Case No. 89-990

Court of Appeal of Florida, Third District

573 So. 2d 87; 1991 Fla. App. LEXIS 10; 16 Fla. L. Weekly D 105

January 2, 1991, Filed

SUBSEQUENT HISTORY: [1]** Released for Publication January 31, 1991. Rehearing Denied January 31, 1991. Review Denied June 27, 1991, Reported at 1991 Fla. LEXIS 1079.
Review denied by Gore v. State, 583 So. 2d 1035, 1991 Fla. LEXIS 1079 (Fla., 1991)
Related proceeding at Gore v. State, 719 So. 2d 1197, 1998 Fla. LEXIS 1889 (Fla., 1998)

PRIOR HISTORY: An Appeal from the Circuit Court for Dade County, Harold Solomon, Judge.

DISPOSITION: Reversed in part; affirmed in part; remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the order of the Circuit Court for Dade County (Florida), that denied his motion to exclude the electronic media from the courtroom after he had presented medical evidence that the media's presence would adversely affect his ability to testify, in a case where defendant was convicted of attempted murder, kidnapping, sexual battery, burglary, robbery, and theft.

OVERVIEW: After the state completed its case against defendant, who was charged with attempted murder, kidnapping, sexual battery, burglary, robbery, and theft, defendant made a motion to exclude electronic media from the courtroom during his testimony. Defense counsel argued that, based on a psychological evaluation, defendant would not have been able to participate effectively in the trial or assist in his defense in the presence of electronic media. Based on the testimony of three psychological experts, the trial court did not exclude the media. Defendant appealed. The exclusion of the electronic media was a matter that rested within the sound discretion of the trial court. There was no finding that such coverage had a substantial effect on defendant that would have been qualitatively different from those of the general public. The appellate court affirmed the convictions for attempted murder, kidnapping, sexual battery, burglary, robbery, and theft. Further, although the trial court erred in allowing the state to introduce certified copies of defendant's prior convictions, his admission of the crimes at trial rendered the error harmless. Two other convictions were reversed. Remanded.

OUTCOME: The appellate court concluded that the trial court did not abuse its discretion in denying defendant's motion to exclude the electronic media from the courtroom during his

testimony. The trial court made no finding that such coverage had a substantial effect on defendant that would have been qualitatively different from those of the public. The appellate court affirmed in part and reversed in part his convictions. The cause was remanded.

CORE TERMS: media, electronic, camera, psychologist's, doctor, competency, interfere, coverage, evidentiary hearing, prior convictions, psychiatrist, courtroom, convicted, television cameras, disorders, lying, adversely affect, attempted murder, competency to stand trial, crimes involving, crime charged, certified copies, charging documents, qualitatively, incompetent, testifying, harmless, abused, arrest, personality disorder

LEXISNEXIS® HEADNOTES Hide

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > Pretrial Motions & Procedures > Competency to Stand Trial

Criminal Law & Procedure > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN1 Although the presence of electronic media in the courtroom does not constitute a per se denial of due process, a trial court is constitutionally required to prohibit electronic media coverage of court proceedings in a criminal case upon a demonstration that such coverage would render an otherwise competent defendant incompetent to stand trial. Upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media, the court may exclude the media. The finding must be on the record, either in writing or orally, in a transcript of the hearing. Moreover, an evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Criminal Law & Procedure > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN2 The exclusion of the electronic media is a matter that rests within the sound discretion of the trial court judge. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions & Procedures > Competency to Stand Trial

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

HN3 Where medical experts' reports conflict, a trial court has not abused its discretion in finding a defendant competent to stand trial. More Like This Headnote

COUNSEL: Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, for appellee.

JUDGES: Jorgenson, Levy, and Goderich, JJ.

OPINION BY: JORGENSON

OPINION

[*88] The principal issue presented by this appeal is whether the trial court abused its discretion by refusing to exclude the electronic media from the courtroom after defendant Marshall Lee Gore had presented medical evidence that the media's presence would adversely affect his ability to testify. We conclude that the trial court did not abuse its discretion in denying Gore's motion to exclude the electronic media and affirm his convictions for attempted murder, kidnapping, sexual battery, burglary, robbery, and theft.

Gore's motion to exclude the electronic media was made after the state had completed presenting its case, thirteen days into the trial. Defense counsel argued that, based upon a psychological evaluation made some months earlier, **[**2]** Gore would not be able to participate effectively in the trial or assist in his defense if the electronic media was present. The psychologist who examined Gore had concluded that Gore suffered from Attention Deficit Disorder and a severe personality disorder that would cause him to want to perform before the cameras, and that the presence of the television cameras would distract him. The trial court conducted an evidentiary hearing at which the examining psychologist was questioned by defense counsel, the state, and the court. In response to a question posed by the court, the psychologist admitted that he could not tell when Gore was lying and when he was telling the truth. Following the evidentiary hearing, the court found Gore competent to testify and denied the motion to exclude the electronic media.

Gore took the stand. When he complained that he was "not going to be able to do this," the court ordered the television camera repositioned so that it was out of Gore's view and would not be able to focus on the defense table. The court then appointed a team of three doctors to examine Gore to determine whether the presence of the television cameras was, in fact, affecting Gore's ability **[**3]** to participate in his trial.

On the next day, the three doctors testified. The first psychiatrist testified that Gore did not suffer from any major illness, was manipulative, and was simply "making an issue" of the presence of the camera. In his opinion, Gore was lying when he said that he would not be able to testify if a camera was present. The second doctor, a psychologist, testified that although Gore suffered from some social disorders the mere presence of the camera in the courtroom would not interfere with his ability to assist his counsel and would not affect his competency. The third doctor, a psychiatrist, testified that he found no evidence that Gore suffered from Attention Deficit Disorder or hyperactivity. He diagnosed Gore as suffering from a severe personality disorder and concluded that the camera's presence would affect Gore's testimony. However, the doctor could not conclusively determine whether Gore could answer questions posed to him before the cameras, if he so desired. The trial court then denied the defense motion to exclude the electronic media during defendant's testimony.

Gore resumed testifying but, after a short while, refused to answer any more questions, **[**4]** saying that he could not continue. The court directed Gore to submit to cross-examination. When the state asked Gore whether he had been convicted of any **[*89]** felonies, Gore answered, "Yes." The state asked, "How many?"; Gore stated that he did not know. The state then asked Gore if he had been convicted of any crimes involving lying; Gore answered, "Yeah." The state then introduced, over objection, certified copies of all of Gore's prior convictions, the charging documents, and the arrest forms for those convictions.

Following the jury's verdicts of guilt and the court's entry of judgments of conviction and sentencing, Gore appealed.

We hold that the trial court acted within its discretion in finding that the presence of the electronic media did not render Gore incompetent to testify. [1] HN1 Although the presence of electronic media in the courtroom does not constitute a *per se* denial of due process, *Chandler v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), a trial court is "constitutionally required

to prohibit electronic media coverage of court proceedings in a criminal case upon a demonstration that such coverage would render an otherwise competent defendant incompetent **[**5]** to stand trial." *State v. Green,* 395 So. 2d 532, 535 (Fla. 1981). Upon a finding that "such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media," the court may exclude the media. *In re Post-Newsweek Stations, Florida, Inc.,* 370 So. 2d 764, 779 (Fla. 1979). The "finding" required by *Post-Newsweek* must be on the record, either in writing or orally, in a transcript of the hearing. *State v. Palm Beach Newspapers, Inc.,* 395 So. 2d 544, 547 (Fla. 1981). Moreover, "an evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding." *Id.* at 548. HN2 The exclusion of the electronic media is a matter that rests within the sound discretion of the trial court judge. *State v. Green,* 395 So. 2d at 536; *State v. Palm Beach Newspapers,* 395 So. 2d at 549.

FOOTNOTES

1 Both in the trial court and before this court, Gore attempted to avoid characterizing the issue of his alleged inability to testify before the camera as one of competency. However, we can discern no meaningful difference between Gore's claim and that of the defendant in State v. Green, 395 So. 2d 532 (Fla. 1981). In *Green,* the defendant sought to exclude the electronic media because, in the opinion of a psychiatrist, the presence of the media would heighten the defendant's anxiety and depression and interfere with her ability to defend herself and communicate with counsel. 395 So. 2d at 535. The supreme court characterized the issue as one of competency to testify. *Id.* at 538. Likewise, Gore's claim that the presence of the camera would interfere with his ability to testify raised the issue of his competency to stand trial. *See also* Fla. R. Crim. P. 3.211(a)(2)(vi) (defendant's capacity to testify relevantly one factor to consider when determining competency to stand trial).

[6]** On two separate occasions, the trial court complied with all of the requirements established by *Post-Newsweek, Green,* and *Palm Beach Newspapers.* Nevertheless, Gore argues that *whenever* a defendant presents competent substantial evidence that the presence of the electronic media will adversely affect his ability to testify, the electronic media must be excluded. That argument flies in the face of reason and a long line of cases which hold that HN3 where medical experts' reports conflict, a trial court has not abused its discretion in finding a defendant competent to stand trial. *See, e.g., Ferguson v. State,* 417 So. 2d 631 (Fla. 1982); *Fowler v. State,* 255 So. 2d 513 (Fla. 1971); *Holmes v. State,* 494 So. 2d 230 (Fla. 3d DCA 1986). The trial court employed every possible precaution to ensure that Gore's constitutional rights were protected, both before Gore began testifying and after he had taken the stand. The court exhibited commendable patience, especially because the state had completed its case before Gore even raised the issue of the presence of the electronic media. 2

FOOTNOTES

2 Defense counsel had in its possession the medical report that formed the basis of the motion months before actually moving to exclude the electronic media.

[7]** No case law in this or any other jurisdiction supports the argument that the trial court loses its broad discretion to determine **[*90]** competency once a defendant presents one psychologist's testimony that the presence of the electronic media would interfere with the defendant's ability to testify. No single expert's opinion should ever be deemed binding on a trial court and preclude the court's consideration of the weight and credibility of other, perhaps conflicting, expert opinions. Accordingly, we hold that the trial court did not abuse its discretion in denying Gore's motion to exclude the electronic media during his testimony.

Next, Gore argues that the trial court erred in allowing the state to introduce certified copies of Gore's prior convictions, the charging documents, and the arrest forms relating to those convictions. We agree that the court committed error. Once Gore admitted that he had been convicted of prior crimes, including crimes involving dishonesty or false statement, the state could go no further. *See Jackson v. State,* 498 So. 2d 906 (Fla. 1986); *Williams v. State,* 511 So. 2d 1017 (Fla. 2d DCA), *rev. denied,* 519 So. 2d 988 (Fla. 1987); *Johnson v. State,* **[**8]** 361 So. 2d 767 (Fla. 3d DCA 1978), *cert. denied,* 382 So. 2d 693 (Fla. 1980). However, such error is subject to a harmless error analysis. *Blasco v. State,* 419 So. 2d 807 (Fla. 3d DCA 1982). In light of the overwhelming evidence against Gore, we hold that the erroneous admission of the prior convictions and the underlying documents was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

However, we reverse Gore's conviction for the attempted murder of the victim's child. Because the overt acts comprising the crime charged were committed in Georgia, not in Florida, the court did not have territorial jurisdiction over the crime charged. Section 910.005, Florida Statutes (1987); *Lane v. State,* 388 So. 2d 1022 (Fla. 1980). The trial court therefore erred in denying Gore's motion for judgment of acquittal as to that charge.

We also reverse Gore's conviction for possession of a weapon during the course of a criminal offense. *Hall v. State,* 517 So. 2d 678 (Fla. 1988); *Carawan v. State,* 515 So. 2d 161 (Fla. 1987).

As to defendant's remaining **[**9]** points on appeal, we find no merit.

Reversed in part; affirmed in part; remanded.

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*548 So. 2d 656, *; 1989 Fla. LEXIS 853, **;*
14 Fla. L. Weekly 441

DERINDA EDWARDS, Petitioner, v. STATE OF FLORIDA, Respondent

No. 73,286

Supreme Court of Florida

548 So. 2d 656; 1989 Fla. LEXIS 853; 14 Fla. L. Weekly 441

September 7, 1989

PRIOR HISTORY: [1]** Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions, Fourth District - Case No. 87-1372, (Broward County).

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a decision from the Fourth District Court of Appeal, Broward County (Florida). The appeals court held that defendant could not cross-examine the victim she was convicted of battering with a deadly weapon about the victim's past drug use and treatment for purposes of impeachment.

OVERVIEW: Defendant was convicted of aggravated battery with a deadly weapon after evidence was introduced at trial that defendant had stabbed the victim with a knife. At the trial, defendant sought to show that the victim's prior drug use impacted her memory of the events at issue. The trial court rejected defendant's argument and excluded the proffered cross-examination testimony of the victim's prior drug use. However, the trial court allowed defense counsel to question the victim about her drug use shortly before the incident. The court of appeals affirmed. The court approved the decision of the court of appeals. Evidence of prior drug use for the purpose of impeachment should be excluded unless the witness was using drugs at the time of the incident or at the time of testifying about the incident or unless other evidence expressly showed that prior drug use affected the witness's ability to remember. The court, thus, affirmed the views it had earlier expressed in Eldridge and Nelson and disproved the decisions by the first district court of appeal in Morrell, Cruz, and Duncan to the extent that they conflicted with the court's opinion.

OUTCOME: The court affirmed a decision by the court of appeals that defendant, convicted of aggravated battery with a deadly weapon, could not cross-examine the victim about her prior drug use. Such impeachment evidence could only be allowed if the witness was using drugs at the time of the incident or at the time of testifying about the incident, or if other evidence clearly showed that past drug use affected the witness's ability to remember.

CORE TERMS: drug use, using drugs, narcotic addiction, introduction of evidence, cross-examination, testifying, addiction, remember, aggravated battery, drug addiction, used drugs, proffered testimony, ability to perceive, purposes of impeachment, citations omitted, probative value, credibility, occurrence, excluding, latitude, impaired, morphine, approve, observe, recount, memory, times

LEXISNEXIS® HEADNOTES Hide

Evidence > Testimony > Credibility > Impeachment > Convictions > General Overview

HN1 The introduction of evidence of drug use for the purpose of impeachment must be excluded unless: (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Richard L. Jorandby, Public Defender and Allen J. DeWeese, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Petitioner.

Robert A. Butterworth, Attorney General, and Carolyn V. McCann and James J. Carney, Assistant Attorneys General, West Palm Beach, Florida, for Respondent.

JUDGES: Overton Ehrlich, C.J., and McDonald, Shaw, Barkett and Grimes, JJ., concur. Kogan, J., dissents.

OPINION BY: OVERTON

OPINION

[*656] We have for review *Edwards v. State*, 530 So. 2d 936 (Fla. 4th DCA 1988), in which the district court held that Edwards was not entitled to cross-examine the aggravated battery victim regarding her past drug use and treatment. The victim had used drugs and had undergone treatment for drug use years prior to the offense, and Edwards intended to show that such drug use detrimentally affected the victim's recollection of events in issue at the trial. We find conflict with *Duncan v. State*, 450 So. 2d 242 (Fla. 1st DCA 1984); *Cruz v. State*, 437 So. 2d 692 (Fla. 1st DCA 1983); and *Morrell v. State*, 335 So. 2d **[**2]** 836 (Fla. 1st DCA 1976). The district court in the instant case acknowledged conflict with *Cruz* and *Morrell*. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. For the reasons expressed, we approve the decision of the district court in the instant case.

The pertinent facts are as follows. Derinda Edwards was convicted of aggravated battery with a deadly weapon, and the evidence at trial established that Edwards stabbed the victim with a knife. During the course of the trial, the defense proffered cross-examination of the victim concerning her prior drug use. During the proffer, the victim testified that she had used drugs for twenty years, but that she had been "clean" for an interval of several years. She also testified that she had previously entered a methadone program for heroin addiction and had successfully completed that program; that she was not using drugs at the time the incident occurred; and that, during the time of her testimony, she was not using drugs. Defense counsel argued to the trial court that Edwards should be allowed to argue to the jury that, based upon the victim's testimony, she was not a credible witness and that her drug use would impair her ability **[**3]** to perceive and remember. The trial court rejected this argument and excluded the proffered testimony, but ruled that Edwards' counsel could question the victim about drug use on the days

preceding the incident and on the night of the incident.

[*657] On appeal, the district court acknowledged that great latitude must be given to defendants in their cross-examination of witnesses and that this latitude includes "the introduction of evidence for purposes of impeachment, that a witness took drugs either when testifying or at the time of the incident involved." 530 So. 2d at 937 (citing *Nelson v. State*, 99 Fla. 1032, 128 So. 1 (1930)). The district court then affirmed the trial court's holding that the proffered testimony was inadmissible, stating:

> When testimony about a witness' past use or misuse of drugs is introduced to discredit the memory and perception of that witness without the benefit of expert medical or psychiatric explanation concerning the effect of drug use on memory and perception, the jury is permitted to draw uninformed and uneducated medical conclusions which they as lay persons are clearly unqualified to do. Indeed, there does not even appear to be consensus in the **[**4]** medical community about the long-term effects of drug use. We therefore decline to extend the scope of cross-examination in this area and hold that the trial court did not err in excluding this testimony.

530 So. 2d at 937 (citations omitted).

Edwards asserts that we should adopt the principle set forth in the First District Court of Appeal's decisions in *Morrell, Cruz*, and *Duncan*. In *Cruz*, the First District Court stated:

> Florida jurisprudence has long sanctioned the admissibility of evidence disclosing that the witness took drugs either at the time he was testifying, or at the time of the occurrence of facts about which he has testified, for the purpose of impeaching his credibility. Our court has gone further, by permitting evidence of the witness's drug-taking at times other than during the occurrence of the offense.

437 So. 2d at 694 (citations omitted).

To adopt that view, we would have to recede from our decision in *Eldridge v. State*, 27 Fla. 162, 9 So. 448 (1891), in which we stated:

> The proof must go further and establish either that the mind of the witness was impaired generally by the use of it, or at least under the influence of the opiate at the **[**5]** time the testimony was taken. The testimony here offered by the State falls short of this test and should have been excluded. There was no testimony to show that the witness . . . was under the influence of morphine either at the trial or at the time of the event about which he testified, nor is it shown that his mind was impaired generally by the use of morphine.

Id. at 185, 9 So. at 453. This view, as expressed in *Eldridge*, is supported by two authoritative commentators. In *Florida Evidence*, Professor Ehrhardt states: "The better view is that evidence of drug addiction or taking drugs at times other than the event or trial is admissible only if it can be shown to be relevant to the witness's ability to observe, remember and recount." C. Ehrhardt, *Florida Evidence* § 608.6 (2d ed. 1984) (footnote omitted). Also, in *McCormick on Evidence*, it is stated:

> As to drug addiction to which more social odium has been attached, many decisions allow it to be shown to impeach, even without evidence that it did in the particular case affect truth-telling, although more courts, absent a particular showing of effect on the witness's veracity, would exclude it. Most federal **[**6]** cases agree. In

> respect to both addictions the excluding courts seem to have the better of the arguments. It can scarcely be contended that there is enough scientific agreement to warrant judicial notice that addiction in and of itself usually affects credibility.

E. Cleary, *McCormick on Evidence* § 45 (3d ed. 1984) (footnote omitted). A contrary view is expressed in *Handbook of Florida Evidence*:

> The trend appears in favor of permitting the introduction of evidence of narcotic addiction. Pursuant to Section 90.401, evidence of narcotic addiction possesses at least the minimum probative value necessary to establish relevancy, with or without the aid of an expert **[*658]** witness to interpret the effect of narcotic addiction on the particular witness. However, introduction of such evidence is subject to exclusion under Section 90.403 whenever unfair prejudice or misleading of the jury is likely to result. Whether evidence has been offered as to the effect narcotic addiction has had on the particular witness's ability to perceive, record, recollect, narrate, and understand the obligation to testify truthfully will be an important factor in assessing the probative value of such evidence **[**7]** in light of the trial concerns recognized in Section 90.403.

M. Graham, *Handbook of Florida Evidence* § 608.4 (1987).

We find that the view expressed by this Court in *Eldridge* and *Nelson* should continue to prevail. [FN1] This view excludes the introduction of evidence of drug use for the purpose of impeachment unless: (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount. None of the petitioner's arguments have convinced us that we should change our previous rulings, and we do not find the Illinois decisions cited by the petitioner to be persuasive. *See People v. Strother*, 53 Ill. 2d 95, 290 N.E.2d 201 (1972); *People v. Lewis*, 25 Ill. 2d 396, 185 N.E.2d 168 (1962); *People v. Crump*, 5 Ill. 2d 251, 125 N.E.2d 615 (1955). We note that in *Crump*, the earliest of these Illinois cases, the witness was actually using drugs on the day of the **[**8]** offense about which she was testifying. We also note that the Illinois court has adopted the view that "habitual users of opium, or other like narcotics, become notorious liars." *Id.* at 261, 125 N.E.2d at 621 (quoting *State v. Fong Loon*, 29 Idaho 248, 258, 158 P. 233, 236 (1916)). We are not willing to adopt that generalization without supporting medical evidence.

We find the district court correctly disposed of the other issues in the instant case and we find no cause to address them in this proceeding.

For the reasons expressed, we approve the decision of the Fourth District Court of Appeal in the instant case and disapprove the decisions of the First District Court of Appeal in *Morrell, Cruz*, and *Duncan* to the extent that they conflict with this opinion.

It is so ordered.

Ehrlich, C.J., and McDonald, Shaw, Barkett ▾ and Grimes, JJ., concur. Kogan ▾, J., dissents.

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*453 So. 2d 173, *; 1984 Fla. App. LEXIS 14101, ***

OSVALDO PEREZ, Appellant, v. STATE OF FLORIDA, Appellee

No. 83-2580

Court of Appeal of Florida, Second District

453 So. 2d 173; 1984 Fla. App. LEXIS 14101

July 20, 1984

CASE SUMMARY

PROCEDURAL POSTURE: Defendant convict appealed his conviction and sentence of the trial court (Florida) arguing the trial court erred in allowing a witness to assert his fifth-amendment privilege against self-incrimination and to refuse to answer certain questions on cross-examination.

OVERVIEW: The state charged defendant with second-degree murder. At a jury trial, the court precluded defense counsel from asking any questions of a witness who allegedly threatened defendant with a knife. Defendant was sentenced to seven years imprisonment. On appeal, defendant argued the trial court erred in permitting the witness to assert a fifth-amendment privilege and to refuse to answer questions concerning his alleged threats to defendant with a knife. The court reversed the conviction by the trial court and remanded the case for a new trial, holding that a witness could not be excused from testifying on fifth-amendment grounds when he had been duly served with a trial subpoena by the state. Additionally, the court held that it was fundamental that defendant had a right on cross-examination to attack the credibility of the witness.

OUTCOME: The court reversed defendant's conviction of manslaughter and remanded the case for a new trial, holding that the trial court had erred in restricting defense counsel from cross-examining a witness in order to attack his credibility. The court also held that the witness could not be excused from testifying on fifth-amendment grounds when he had been served with a trial subpoena by the state.

CORE TERMS: manslaughter, killed, cross-examination, battery, knife, stabbed, defense counsel, murder, jury instruction, new trial, credibility, restricting, asking, bias, self-incrimination, questioning, fight, dog

LEXISNEXIS® HEADNOTES Hide

Evidence > Privileges > Self-Incrimination Privilege

HN1 A witness cannot be excused from testifying on fifth-amendment grounds when he has been duly served with a trial subpoena by the state. Fla. Stat. 914.04. More Like This Headnote

COUNSEL: **[**1]** Jack D. Hoogewind, Ridge Manor, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

JUDGES: Scheb, J. Grimes, A.C.J., and Campbell, J., concur.

OPINION BY: SCHEB

OPINION

[*173] Defendant, Osvaldo Perez, appeals his conviction and sentence for manslaughter. He argues the trial court erred in allowing a witness to assert his fifth-amendment privilege against self-incrimination and to refuse to answer certain questions. We find his argument meritorious and reverse.

The state charged defendant with second-degree murder in the June 12, 1983, stabbing death of Juan Marchan at a tavern in Dade City. At his jury trial a number of witnesses testified that five or six people, including the defendant and Marchan, were involved in a fight outside the bar. None of the witnesses, however, saw who stabbed Marchan.

While some of the testimony of the state's witnesses inferred defendant's guilt, Esquivel Delgado, a convicted felon, gave the only direct testimony that the defendant stabbed Marchan. Delgado was in the same cellblock with defendant after defendant was arrested. According to Delgado, **[*174]** while **[**2]** another inmate was reading defendant a newspaper article about the incident, the defendant said that "he had done that." Delgado stated that defendant said "that he had not killed a dead man, that he had killed a dog and if he had to do it again, he would do it again." Upon further questioning, Delgado testified that defendant said "that he had not killed a Christian, that he had killed a dog and if he was born again, he would do it again." According to Delgado, the defendant admitted that he stabbed a person known as Juan twice in the right side.

On cross-examination defense counsel asked Delgado why he had made a knife in the jail cell "to go after" the defendant. Delgado's attorney, who was present only to advise Delgado of his fifth-amendment rights, objected on the ground that Delgado's answer might tend to incriminate him. Defense counsel countered that it was necessary to pursue this line of inquiry to show Delgado's bias against the defendant. The court upheld Delgado's assertion of the fifth-amendment privilege against self-incrimination and ruled that Delgado did not have to answer the question. Furthermore, the court precluded counsel from asking any questions involving **[**3]** Delgado's possession of a knife. During the remainder of his testimony, Delgado vacillated to some extent as to whether the defendant clearly indicated whom he had supposedly killed.

At the close of all the evidence, defense counsel requested instructions on manslaughter, battery and assault. The trial court only instructed the jury on second-degree murder and the lesser offense of manslaughter. The jury found defendant guilty of manslaughter. The trial court sentenced him to seven years imprisonment, and this appeal ensued.

The defendant forcefully argues that the court erred in permitting the witness Delgado to assert a fifth-amendment privilege and to refuse to answer questions concerning his alleged threats to the defendant with a knife. He contends that the court should have ordered Delgado to respond to

that line of questioning, because it was essential to his attack on Delgado's credibility. Moreover, defendant contends this inquiry was crucial to his defense, because Delgado's testimony was the only direct evidence indicating the defendant, one of several participants in the fight, had stabbed the victim. We agree.

HN1 A witness cannot be excused from testifying on **[**4]** fifth-amendment grounds when, as here, he has been duly served with a trial subpoena by the state. § 914.04, Fla.Stat. (1983). Under these circumstances this statute, which is self-executing, granted use immunity to Delgado. *Jenny v. State*, 447 So.2d 1351 (Fla. 1984). Consequently, the court erred in restricting defense counsel's cross-examination of Delgado.

It is fundamental that the defendant had the right on cross-examination to attack Delgado's credibility. *Lewis v. State*, 335 So.2d 336, 339 (Fla. 2d DCA 1976). Defense counsel's obvious purpose in asking questions regarding Delgado's alleged threats with a knife was to show Delgado's hostility, if any, toward the defendant. Such bias was not brought out in any other testimony; therefore, the court's error in restricting cross-examination on this point was not harmless.

Consequently, the defendant is entitled to a new trial. Of course, he can not be retried for the charge of second-degree murder. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); Fla.R.Crim.P. 3.640(a).

Finally, the defendant argues that the trial court erred in refusing to give his requested jury instruction on **[**5]** the lesser-included offense of battery. In view of our holding, we decline to address that issue. However, on retrial, if the information alleges and the evidence establishes a battery, then a jury instruction on battery would be appropriate. *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla. 1981); Fla.R.Crim.P. 3.510(b).

[*175] Accordingly, we reverse the defendant's conviction for manslaughter and remand for a new trial.

GRIMES, A.C.J., and CAMPBELL, J., Concur.

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The 2014 Florida Statutes

Title VII EVIDENCE | Chapter 90 EVIDENCE CODE | View Entire Chapter

90.803 Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) SPONTANEOUS STATEMENT.—A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) EXCITED UTTERANCE.—A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.—

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.—Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) RECORDED RECOLLECTION.—A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with

knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) PUBLIC RECORDS AND REPORTS.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) RECORDS OF VITAL STATISTICS.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) ABSENCE OF PUBLIC RECORD OR ENTRY.—Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) RECORDS OF RELIGIOUS ORGANIZATIONS.—Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES.—Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) FAMILY RECORDS.—Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.—The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.—A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) STATEMENTS IN ANCIENT DOCUMENTS.—Statements in a document in existence 20 years or more, the authenticity of which is established.

(17) MARKET REPORTS, COMMERCIAL PUBLICATIONS.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) ADMISSIONS.—A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.—Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.—Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) REPUTATION AS TO CHARACTER.—Evidence of reputation of a person's character among associates or in the community.

(22) FORMER TESTIMONY.—Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSON OR DISABLED ADULT.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

History.—s. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; ss. 20, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 4, ch. 85-53; s. 11, ch. 87-224; s. 2, ch. 90-139; s. 3, ch. 90-174; s. 12, ch. 91-255; s. 498, ch. 95-147; s. 1, ch. 95-158; s. 2, ch. 96-330; s. 1, ch. 98-2; s. 2, ch. 2003-259; s. 1, ch. 2013-98; s. 1, ch. 2014-200.

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*24 So. 3d 17, *; 2009 Fla. LEXIS 1381, **;*
34 Fla. L. Weekly S 486

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STEVEN DOUGLAS HAYWARD, Appellant, vs. STATE OF FLORIDA, Appellee.

No. SC07-1234

SUPREME COURT OF FLORIDA

24 So. 3d 17; 2009 Fla. LEXIS 1381; 34 Fla. L. Weekly S 486

August 27, 2009, Decided

SUBSEQUENT HISTORY: Released for Publication, December 10, 2009.
Rehearing denied by Hayward v. State, 2009 Fla. LEXIS 2063 (Fla., Dec. 10, 2009)
US Supreme Court certiorari denied by Hayward v. Florida, 2010 U.S. LEXIS 3508 (U.S., Apr. 26, 2010)

PRIOR HISTORY: [1]**
An Appeal from the Circuit Court in and for St. Lucie County, James Walter McCann, Judge -- Case No. 562005CF000463A.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted in the Circuit Court in and for St. Lucie County (Florida) on charges of first-degree murder, robbery with a deadly weapon, burglary of a conveyance while armed, and possession of a firearm by a convicted felon. He appealed his conviction for first degree murder and the sentence of death. He raised ten issues on appeal.

OVERVIEW: The statement of the murder victim to police describing his attacker qualified as an excited utterance but not as a dying declaration. However, admission of the statement violated the Confrontation Clause as it was testimonial. Given the strength and nature of the other evidence connecting defendant to the crime, the error was harmless beyond a reasonable doubt. The introduction of defendant's statements to police at the rooming house and their observations while did not violate his Fourth Amendment rights. While defendant was in custody when he made statements at the police station, he had been advised of his Miranda rights. The police had probable cause to detain or arrest him. The recorded conversations defendant had with his girlfriend from jail were not improperly admitted into evidence; they were not more prejudicial than probative. While the prosecutor's comparison of the choices made by the victim and defendant was improper, it was not fundamental error. Defendant's challenge to constitutional of Florida's death sentencing scheme failed. The evidence as to identification, premeditation, and whether a robbery was accomplished was sufficient.

OUTCOME: Defendant's convictions for first-degree murder, robbery with a deadly weapon,

burglary of a conveyance while armed, and possession of a firearm by a convicted felon were affirmed, and his sentence of death was affirmed.

CORE TERMS: murder, shot, robbery, rooming house, hearsay, utterance, declarant's, sentence, penalty phase, sentencing, prosecutor, encounter, excited, aggravator, felony, wound, robbed, blood, death sentence, dying declaration, admissible, probable, arrest, victim impact evidence, conversation, testimonial, assailant, scene, police officer, shooting

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Criminal Law & Procedure > Arrests > Miranda Warnings

Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation

Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

HN1 In the Miranda decision, the United States Supreme Court held that any statements made in response to interrogation by a defendant in police custody would be admissible at trial only if the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and the defendant understood these rights and voluntarily waived them. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Imposition > Findings

Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums

HN2 In the Ring decision, the United States Supreme Court held that a defendant has a Sixth Amendment right to have a jury find all facts upon which the legislature conditions an increase in the maximum punishment. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

Evidence > Procedural Considerations > Rulings on Evidence

Governments > Courts > Judicial Precedents

HN3 A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. The trial court's discretion is constrained, however, by the application of the rules of evidence and by the principles of stare decisis. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements

HN4 In order for a statement to qualify as an excited utterance exception to the hearsay rule pursuant to § 90.803(2), Fla. Stat. (2007), a statement must be made regarding an event startling enough to cause nervous excitement before there was time to contrive or misrepresent and while the person was under the stress or excitement caused by the event. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements

HN5 In determining if a statement qualifies as an excited utterance exception to the hearsay rule, it is not necessary that the statement illustrate the startling event; it is enough that the statement relate to the event. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements

HN6 While an excited utterance need not be contemporaneous to the event, it must be made while the declarant is under the stress of the startling event and without time for reflection. The statement must be made without time for reflective thought because it is the lack of time to contrive or misrepresent the facts that provides the reliability for such statements. The test regarding the time elapsed is not a bright-line rule of hours or minutes. The factors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview

HN7 While the length of time between the event and the statement is a factor to be considered in determining whether that statement may be admitted under the excited utterance exception, the immediacy of the statement is not a statutory requirement. More Like This Headnote

Evidence > Hearsay > Exceptions > Dying Declarations > Belief of Imminent Death

HN8 Pursuant to § 90.804(2)(b), Fla. Stat. (2007), and the Supreme Court of Florida's prior rulings, the deceased must have known and appreciated his condition as being that of an approach to certain and immediate death, although it is not necessary that the declarant make express utterances that he would never recover. Rather, a court should satisfy itself, on the totality of the circumstances, that the deceased knew he was dying. The absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, are a preliminary foundation that must always be laid to make such declarations admissible under the dying declaration exception to the hearsay rule. Further, the declarant must not have merely considered himself in imminent danger, but he must have believed he was without hope of recovery. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN9 See U.S. Const. amend. VI.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN10 Where testimonial evidence is at issue, the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > Hearsay > General Overview

Evidence > Hearsay > Unavailability > General Overview

HN11 The introduction of a hearsay statement will result in a violation of a defendant's Sixth Amendment right to confrontation if: (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. Only testimonial statements cause the declarant to be a witness within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. The mere fact that evidence meets the requirements of an exception to the hearsay rule does not necessarily mean it is admissible as evidence. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN12 In determining whether a statement is testimonial in the context of the Confrontation Clause, a court may consider factors such as (1) whether the declarant was speaking about events that were currently happening or circumstances that could currently be responded to, as opposed to events that were clearly in the past and could only be investigated and litigated; (2) whether the declarant was facing an ongoing emergency, describing or seeking help for current physical danger; and (3) whether the setting of the declarant's statement was a perilous crime scene or a safe location. More Like This Headnote

Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

HN13 There is an inquiry which must be undertaken to determine if an error requires reversal or is harmless beyond a reasonable doubt. Once error has been established, the question is whether there is a reasonable possibility that the error affected the verdict. The burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. In making that analysis, a court will consider both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have possibly influenced the jury verdict. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence

HN14 Where the evidence introduced in error was not the only evidence on the issue to which the improper evidence related, the introduction can be harmless. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > General Overview

HN15

The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV and Art. I, § 12, Fla. Const. Evidence obtained in violation of those constitutional protections is generally excluded. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Seizures of Persons

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN16 The Fourth Amendment requires all warrantless seizures of a person to be founded upon at least reasonable suspicion that the individual seized is engaged in wrongdoing. However, only when the police, by means of physical force or show of authority, have in some way restrained the liberty of a citizen is there a seizure of that person. Seizures of the person include both formal arrests and seizures that involve only a brief detention short of traditional arrest. The inquiry in law enforcement encounter cases is whether there has been an intrusion upon constitutionally protected rights. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Seizures of Persons

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN17 There are three levels of encounter that a person may have with law enforcement: (1) a consensual encounter that involves only minimal police contact during which a citizen may either voluntarily comply with a police officer's requests or choose to ignore them and leave; (2) an investigatory stop as enunciated in the Terry decision, during which a police officer may detain a citizen temporarily if the officer has a reasonable, well-founded, and articulable suspicion that a person has committed, is committing, or is about to commit a crime; and (3) an arrest, which must be supported by probable cause that a crime has been or is being committed. When determining whether a particular encounter is consensual, a court must look to the totality of the circumstances surrounding the encounter to decide if the police conduct would have communicated to a reasonable person that the person was free to leave or terminate the encounter. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Seizures of Persons

HN18 In order to determine if a defendant's Fourth Amendment rights were violated, a court must first determine if and when defendant was detained. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Interrogation > General Overview

HN19 Interrogation takes place when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Spontaneous Statements

HN20 Spontaneous statements are not always the product of an interrogation. Spontaneous statements are admissible in evidence when they are not the product of interrogation. More Like This Headnote

Criminal Law & Procedure > Arrests > Miranda Warnings

Criminal Law & Procedure > Search & Seizure > Seizures of Persons

HN21 Constitutional errors committed prior to an official arrest cannot be cleansed by the simple remedy of administering Miranda warnings later. More Like This Headnote

Criminal Law & Procedure > Arrests > Probable Cause

Criminal Law & Procedure > Arrests > Warrantless Arrest

HN22 Probable cause for arrest exists where an officer has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction. The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. More Like This Headnote

Criminal Law & Procedure > Arrests > Probable Cause

Evidence > Hearsay > General Overview

HN23 Hearsay can be used to establish probable cause to arrest, even if it may not be used at trial. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN24 Admission of probative but potentially prejudicial evidence is controlled by § 90.403, Fla. Stat. More Like This Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN25 See § 90.403, Fla. Stat. (2007).

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN26 Section 90.403, Fla. Stat. compels a trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence. More Like This Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN27 In the context of applying § 90.403, Fla. Stat., evidence of conduct or speech of the accused which demonstrates a consciousness of guilt is relevant since it supplies the basis for an inference that the accused is guilty of the offense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

HN28 In conducting a harmless error analysis, the focus is on the effect on the trier of fact. The question to be considered is whether there is a reasonable possibility that the error affected the verdict, with the burden being on the State to demonstrate beyond a reasonable doubt that it did not. More Like This Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN29 In determining whether to impose a death sentence, a prior violent felony aggravator has been regarded as one of the weightiest aggravators. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Prosecutorial Misconduct

HN30 In order to preserve a claim of improper prosecutorial argument, counsel must contemporaneously object to improper comments. More Like This Headnote

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Prosecutorial Misconduct

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN31 When a claim of improper prosecutorial argument is unpreserved, fundamental error must be shown for resentencing to be required. The failure to make a contemporaneous objection to improper closing argument waives any claim concerning such comments for appellate review unless the unobjected-to comments rise to the level of fundamental error. That is a high burden which requires an error that goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Exceptions to Failure to Object

HN32 Fundamental error is error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Exceptions to Failure to Object

HN33 Error during the penalty phase of a capital case is fundamental if it is so prejudicial as to taint the jury's recommended sentence. More Like This Headnote

Criminal Law & Procedure > Sentencing > Imposition > Evidence

Criminal Law & Procedure > Sentencing > Imposition > Victim Statements

HN34 Victim impact evidence is admissible, but its purpose is to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. § 921.141(7), Fla. Stat. (2007). Section 921.141 specifically states that characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence. § 921.141(7), Fla. Stat. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Appeals > Remands & Remittiturs

Criminal Law & Procedure > Appeals > Reversible Errors > Prosecutorial Misconduct

HN35 Reversal for improper prosecutorial comment is not automatic, and in the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Imposition > Evidence

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Prosecutorial Misconduct

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN36 When a defendant sentenced to death fails to make a contemporaneous objection to an erroneous prosecution argument, he must demonstrate the error is fundamental; that is, he must demonstrate that the error reaches down into the validity of the trial itself and that a sentence of death could not have been obtained without the assistance of the alleged error. In determining whether fundamental error has occurred, an appellate court reviews the totality of the circumstances. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Imposition > Evidence

Criminal Law & Procedure > Sentencing > Imposition > Victim Statements

HN37 Victim-defendant comparisons are improper; there is a limited purpose for which victim impact evidence may be introduced. More Like This Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN38 Section 921.141(3), Fla. Stat. (2008) makes specific reference to a sentencing recommendation by a majority of the jury. Florida's capital sentencing statute allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote whether to recommend death. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Jury Instructions > Objections

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Jury Instructions

HN39 Issues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview

HN40 In Florida, the standard jury instructions are sufficient to explain premeditation. The standard first-degree murder instruction addresses all of the points discussed in the McCutchen decision and properly instructs the jury about premeditated design. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

HN41 A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide and that if the party at the time was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences, the intent or design would be premeditated within the meaning of the law. More Like This Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Imposition > Evidence

HN42 Where a death sentence is supported by the prior violent felony aggravating factor, Florida's capital sentencing scheme does not violate the Ring decision. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Evidence

HN43 The Supreme Court of Florida has a mandatory obligation to review evidence in every case in which a sentence of death has been imposed regardless of whether the appellant has challenged the evidence. Fla. R. App. P. 9.142(a)(6). More Like This Headnote

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

Evidence > Procedural Considerations > Weight & Sufficiency

HN44 In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt. More Like This Headnote

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Evidence > Procedural Considerations > Weight & Sufficiency

HN45 If the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of each offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > Elements

HN46 See § 812.13(1), Fla. Stat. (2008).

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

Evidence > Inferences & Presumptions > Inferences

HN47 Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

Evidence > Procedural Considerations > Weight & Sufficiency

HN48 Even if there is or could be error on one theory, if another theory of murder is factually supported, there is no need for reversal. More Like This Headnote

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview

HN49 The Florida Court of Appeals reviews every death sentence for proportionality regardless of whether the issue is raised on appeal. Fla. R. App. P. 9.142(a)(6). In reviewing proportionality, the court follows precedent that requires that the death penalty be reserved only for those cases where the most aggravating and least mitigating circumstances exist. Therefore, in deciding whether death is a proportionate penalty, the court makes a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. Accordingly, the court considers the totality of the circumstances and compares the case with other similar capital cases. That analysis is not a comparison between the number of aggravating and mitigating circumstances. Rather, that entails a qualitative review by the court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. Further, in a proportionality analysis, the court will accept the weight assigned by the trial court to the aggravating and mitigating factors. It will not disturb the sentencing judge's determination as to the relative weight to give to each established mitigator where that ruling is supported by competent substantial evidence in the record. More Like This Headnote | *Shepardize:* Restrict By Headnote

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JUDGES: QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

OPINION

[*23] *REVISED OPINION*

PER CURIAM.

Steven Douglas Hayward appeals from a judgment of conviction of first-degree murder and sentence of death. [1] He also appeals his convictions for armed robbery, armed burglary of a conveyance, and possession of a firearm by a convicted felon. For the reasons set forth below, we

affirm the convictions and the sentence of death.

FOOTNOTES

1 We have jurisdiction. *See* art. V, § 3(b) (1), Fla. Const.

OVERVIEW

Steven Douglas Hayward (Hayward) was convicted of the first-degree murder of Daniel Destefano (Destefano) in St. Lucie County. Hayward was also convicted of robbery with a deadly weapon, burglary of a conveyance while armed, and possession of a firearm by a convicted felon. Destefano, a newspaper **[**2]** delivery man in Fort Pierce, was robbed and shot while filling up a newsstand at a convenience store in the early morning hours of February 1, 2005. The jury found Hayward guilty of all charges. During the penalty phase, after considering several aggravating circumstances, including Hayward's prior conviction for second-degree murder, and mitigation presented by the defense, the jury voted eight to four to recommend a sentence of death, which the trial court imposed.

Hayward raises nine claims on appeal. In addition to considering the claims raised by Hayward, we have a mandatory duty to examine the sufficiency of the evidence and to determine if Hayward's death sentence was proportionate. We first examine the facts surrounding the murder.

[*24] FACTS AND PROCEDURAL HISTORY

The Circumstances of the Murder and the Investigation

Sometime before 4 a.m. on the morning of February 1, 2005, Destefano arrived at a convenience store and began filling the vending machine with newspapers. Destefano had secured a concealed weapons permit for a .357 caliber silver revolver which he was wearing in a holster on his belt. Roosevelt McDowell (McDowell), a resident of a nearby rooming house, heard "hollering" **[**3]** and heard Destefano shout, "I don't have no more, I don't have no more." McDowell then heard two gunshots followed by another, louder gunshot. He opened the door to his room and saw a person he described as Mexican 2 on one knee who was continuing to say, "I don't have no more." McDowell saw a black man searching through a nearby car. McDowell testified that the man then went to the street light on the corner where McDowell could see the man examining his bleeding left hand. According to McDowell, the man was wearing some sort of head covering. McDowell then saw Destefano limp away in an easterly direction and saw the black man take a short-cut around McDowell's rooming house, leaving the area in a westerly direction.

FOOTNOTES

2 Destefano was of Italian descent with dark olive skin.

Sometime shortly after 4 a.m., Destefano was found about a block away by an early morning fisherman, who called 911. Officer James Grecco of the Fort Pierce Police Department received the 911 dispatch and quickly responded, arriving about two or three minutes before the paramedics arrived. As the paramedics prepped Destefano for transport, Officer Grecco asked Destefano, "What happened?" Destefano stated that a black **[**4]** male with a black stocking cap over his face ran up to him and shot him. He also told the officer that he fired back with his handgun, but that he "didn't know what happened to it." Soon thereafter, Destefano lost consciousness and died.

Dorothy Smith, Hayward's girlfriend, lived in a rooming house a few blocks away from the convenience store where Destefano was shot. According to Smith, on the morning of the shooting, Hayward arrived at her room just before dawn with an injury to his hand. He claimed

the injury was inflicted by two black men who robbed him and shot him in the hand. Smith immediately urged him to go to the hospital and asked if he wanted her to call an ambulance or the police. Hayward vehemently refused Smith's offer and even unplugged the telephone to prevent her from calling anyone. Hayward then went around the rooming house asking various residents to sew up his hand, but no one would do so.

A few hours later, when Smith learned from a television newscast that someone had been shot at the convenience store, she asked Hayward about the shooting. He denied any involvement and told her that he had been shot at a different location. Just before Smith left for the store **[**5]** that morning to buy something for breakfast, she retrieved a bloody ten-dollar bill Hayward had placed in a drawer that morning. When she returned, she found Hayward packing his bags to leave, but she convinced him to stay. Shortly thereafter, Hayward sold a silver handgun for $ 100. [3]

FOOTNOTES

3 Destefano's fiancee testified that Destefano's gun was silver.

Two days after the shooting, the police responded to Smith's rooming house after receiving a report that someone there had a possible gunshot wound to the hand and **[*25]** had been asking the residents to sew it up. When the officers arrived, they found the front door open but asked and received permission from other residents to enter the common area. The residents then directed the officers to Smith's open door where they knocked on the door frame and Smith answered. As Smith was talking to the officers, Hayward came out of the communal bathroom located directly across from Smith's room and walked into the hallway where the officers were standing. The officers immediately noticed his bandaged hand and asked if they could see the wound. Hayward removed the bandage and, when the officers asked him what happened, he and Smith both indicated that Smith **[**6]** had "cut" him with a knife. At this point, Detective Dan Flaherty asked Officer Darren Mace and Hayward to go outside so he could talk with Smith alone. Hayward complied and stepped outside with the officer, where Officer Mace asked him to come to the police station to talk about the "cut" on his hand. Hayward agreed and was handcuffed before being placed in the back seat of the police car. Officer Mace told Hayward that he was not under arrest, and that it was police policy to handcuff anyone being transported in a police car.

After being handcuffed, but just before entering the car, Hayward suddenly stated to Officer Mace that he "wasn't going to lie," that he had been robbed the other day and thought he had been shot. Officer Mace left Hayward in the squad car and went to inform Detective Flaherty of Hayward's statement. Smith, who was within hearing distance of the officers' conversation, then revised her story as well. She said that she had gotten in an argument with Hayward the afternoon before the murder and had stabbed him in the hand. She added that when he returned the next morning, he told her that he had been shot in the very same hand by two black men who robbed him.

Once **[**7]** at the police station, Officer Mace took off Hayward's handcuffs but secured him by an ankle bracelet to a table in an interview room. Hayward was then advised of his *Miranda* rights. [4] After waiving his *Miranda* rights and agreeing to discuss the incident, Hayward provided the officers with several different versions of how his hand was injured. He told the officers that he lied when he first claimed he had been stabbed. He explained that he had actually been robbed by two men, one black and one Mexican, while trying to sell marijuana at the convenience store. Hayward told the officers that he was shot in the hand as he tried to take the gun away from the black robber.

FOOTNOTES

4 HN1 In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that any statements made in response to interrogation by a

defendant in police custody would be admissible at trial only if the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and the defendant understood these rights and voluntarily waived them. Hayward does not claim that the interview statements admitted into evidence **[**8]** were obtained in violation of the requirements of *Miranda*.

Hayward subsequently changed his story again, this time stating that he was not robbed at all, but instead had witnessed Destefano being robbed and shot by a lone black man. Hayward said that he attempted to pick up a gun left at the scene but dropped it and it went off, shooting him in the hand. He told the officers that even though his hand was bleeding, he went through Destefano's car looking for anything of value. After concluding his statement, Hayward was arrested for Destefano's murder.

[*26] A few months later, when the common laundry room in Smith's rooming house was renovated, a black .22 caliber revolver identified as the murder weapon was found behind a board covering a vent in the wall. Hayward's blood was discovered inside the gun's firing chambers.

Medical Examiner Dr. Charles Diggs testified that Destefano suffered a nonfatal injury to his left thigh from a .22 caliber bullet that entered the thigh horizontally, which was consistent with Destefano standing up when the shot was fired. Destefano died as a result of internal bleeding caused by a second .22 caliber bullet that entered Destefano's upper left chest area and **[**9]** traveled downward at a forty-five-degree angle, coming to rest in his lower intestine. This was consistent with Destefano having been shot from above, while kneeling.

Because he bled internally, Destefano's blood was not found at the crime scene. On the other hand, a great deal of Hayward's blood was found at the crime scene, on several of Destefano's personal items found strewn around his car, on the door frame of Destefano's car, on several locations on the outside walls of McDowell's rooming house, and on a fence post adjacent to the rooming house. The hooded jacket that Hayward was wearing the morning of the murder evidenced a number of heavy blood transfer stains [5] originating from Hayward. There was a large tear on the inside pocket of the jacket, which also bore evidence of Hayward's blood. Criminalist Earl Ritzline testified that the tear was big enough to have been used as a hiding place for two guns. Significantly, even though in his statement to the police Hayward denied touching Destefano, the front and back of Destefano's pants were stained with large amounts of Hayward's blood, including heavy transfer blood stains on Destefano's back pockets. Ritzline opined that the **[**10]** perpetrator had pushed his bloody hand inside the pockets while searching them.

FOOTNOTES

5 Blood transfers or wipes on fabric are usually highly concentrated. This can occur, for example, when a person presses a bloody object, such as a hand, against the fabric, in essence crushing large quantities of blood into the fabric.

The jury also heard portions of two taped telephone calls Hayward made to Smith from jail shortly after his arrest, which the State offered as proof of Hayward's consciousness of guilt and to show Hayward was attempting to coach Smith in her testimony. At the close of the evidence, the defense argued in a motion for judgment of acquittal that the State had not refuted Hayward's hypothesis that he was only an observer and not the actual shooter. The motion was denied and the case was submitted to the jury. The jury found Hayward guilty of first-degree murder, robbery, burglary of a conveyance, and possession of a firearm by a convicted felon.

Penalty Phase and Sentencing

During the penalty phase, the State presented evidence of Hayward's 1988 convictions for second-degree murder and two counts of armed robbery. A witness to the 1988 crimes testified

that he was standing outside **[**11]** a bar talking to the victim when Hayward and his codefendant began shooting Uzis in the parking lot. Hayward approached the victim from behind and said, "Let me have it." When the victim looked over his shoulder and laughed, Hayward shot the victim from behind. The witness stated that after the first shot, Hayward repeatedly pulled the trigger on the Uzi, but it had apparently jammed and only made a clicking sound. The lead detective in that case testified that the victim was shot in the groin area and bled **[*27]** to death. The detective testified that when questioned, Hayward admitted he was present when the murder occurred, but claimed that he was only an observer. Hayward also told the police that two black youths from Fort Lauderdale committed the murder, and he offered a location where the perpetrators might be found. Hayward eventually pled nolo contendere to the crimes.

Victim impact testimony was offered by Destefano's mother, sister and fiancee. They spoke about Destefano's character, his hard work, and how much he would be missed by them.

In mitigation, Hayward presented the testimony of psychologist Dr. Michael Reardon, as well as the testimony of four family members: Hayward's brother, **[**12]** his two sisters, and his mother. Dr. Reardon testified that Hayward had the potential to be rehabilitated because he had shown an ability to focus on learning despite his low average IQ (91), as exemplified by his attainment of a GED while in prison for the first murder. The psychologist also indicated that Hayward had made license plates and worked in other areas while in prison. Hayward's mother testified that due to the family's financial difficulties, she had to work two jobs and was absent from the home quite often. In her absence, Hayward's older half-siblings took care of and disciplined him. Hayward's mother testified that his siblings often picked on Hayward and even beat him up. She testified that Hayward's stepfather was present in the home during Hayward's early years, but later, Hayward's biological father, an alcoholic, came to live with the family. Hayward grew up without a consistent father-figure in his life. The jury recommended a death sentence by a vote of eight to four.

In sentencing Hayward to death, the court found three aggravators: (1) that Hayward had prior violent felony convictions based on his convictions for second-degree murder and two counts of armed **[**13]** robbery, to which the court assigned "extremely great weight"; (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed for pecuniary gain. The court found that the second and third aggravators merged and gave the single aggravating circumstance "great weight." There were no statutory mitigators offered or found, but the court found the following nonstatutory mitigators applicable: (1) Hayward could have received a life sentence; (2) he grew up without a father; (3) he was loved by his family; (4) he had academic problems; (5) he obtained a GED in prison; (6) he would make a good adjustment to prison; (7) he had financial stress at the time of the crime; and (8) he had some capacity for rehabilitation. Each was given "little weight" except for the factor that Hayward could have gotten a life sentence, which was given "very little weight," and the factor that he grew up without a father, which was given "some weight." The trial court, in the sentencing order, summarized its reasoning in sentencing Hayward to death as follows:

> Not only does this Court find that the totality of the aggravating circumstances in this case far outweigh the mitigating **[**14]** circumstances, but the Court expressly finds that *each* statutory aggravator, when considered *alone* outweighs the totality of the mitigating circumstances.
>
> The facts supporting the Defendant's previous conviction for Second Degree Murder and Armed Robberies, which formed the basis of the first statutory aggravating circumstance are compelling. When compared to the facts and circumstances of the murder and robbery in this case, they are alarming. The Defendant had been released from **[*28]** the Department of Corrections eighty-seven (87) days prior to committing another murder and robbery in which the life of another innocent human being was senselessly ended. It is difficult to imagine how the Defendant could have robbed and killed a person in 1988, served 16 years in prison for those crimes with more than enough time to contemplate the horrific, irreversible and unforgivable consequences of his actions, yet within ninety days of release from prison, commit

the same crimes resulting in the same horrific, irreversible and unforgivable consequences.

ISSUES ON APPEAL

On appeal, Hayward asserts that (1) the statements of the murder victim to police describing his attacker were improperly admitted **[**15]** under the excited utterance and dying declaration exceptions to the hearsay rule, and in violation of the Confrontation Clause; (2) introduction of Hayward's statements to police at the rooming house and their observations while there violated his Fourth Amendment rights; (3) introduction of the recorded jail conversations between Hayward and Smith were more prejudicial than probative due to the vulgarity of the language used, affecting both the guilt and penalty phases; (4) comments made by the prosecutor in closing argument during the penalty phase comparing the life choices made by the victim and Hayward constituted prosecutorial misconduct requiring resentencing; (5) there was insufficient evidence concerning the identity of the shooter; (6) there was insufficient evidence as to whether a robbery was actually accomplished; (7) there was insufficient evidence establishing premeditation; (8) the standard jury instruction on premeditation is insufficient; (9) Florida's sentencing scheme is unconstitutional under the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); [6] and (10) imposition of a death sentence based on an eight-to-four jury recommendation **[**16]** is unconstitutional. We will first analyze Hayward's claims challenging the admission of evidence in the guilt phase of the trial.

FOOTNOTES

6 HN2 In *Ring*, the Supreme Court held that a defendant has a Sixth Amendment right to have a jury find all facts upon which the Legislature conditions an increase in the maximum punishment. *See* 536 U.S. at 589.

EVIDENTIARY CLAIMS

Hayward asserts that the trial court committed a number of errors in admitting evidence. In this section, we will discuss the following claims of error: (1) that the statements of the murder victim to police describing his attacker were improperly admitted under the excited utterance and dying declaration hearsay exceptions, and in violation of the Confrontation Clause; (2) that admission of statements Hayward made to police and their observations at the rooming house violated his Fourth Amendment rights; and (3) that the introduction of the recorded telephone conversations between Hayward and Smith was more prejudicial than probative due to the vulgarity of the language used.

Hearsay Claim

Hayward asserts that the trial court erred in allowing into evidence Destefano's statement describing his attacker to the first responding police officer. **[**17]** He contends that the statement was improperly admitted under the dying declaration and excited utterance exceptions to the hearsay rule, and that admission of the statement violated the Confrontation Clause. *See* U.S. Const. amend. VI.

Officer Grecco testified at trial that as Destefano was being prepped for transport **[*29]** by the paramedics, Grecco asked him, "What happened?" Destefano was able to tell Officer Grecco that a black male with a black stocking cap over his face ran up to him and shot him. He also told the officer that he fired back with his handgun but that he "didn't know what happened to it." Soon thereafter, Destefano lost consciousness and died. The trial court overruled Hayward's hearsay objection, ruling that the statement was admissible both as an excited utterance and a dying declaration. As discussed below, we conclude that Destefano's statement qualified as an excited

utterance but not as a dying declaration. We also conclude that even though the statement qualified as an excited utterance, its admission violated the Confrontation Clause because the statement was testimonial. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). However, any error in admitting the statement **[**18]** was harmless beyond a reasonable doubt.

A. Excited Utterance Exception

HN3 A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998). The trial court's discretion is constrained, however, by the application of the rules of evidence, *Johnston v. State*, 863 So. 2d 271, 278 (Fla. 2003), and by the principles of stare decisis. *McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007). HN4 In order for a statement to qualify as an excited utterance exception to the hearsay rule pursuant to section 90.803(2), Florida Statutes (2007), "the statement must be made: (1) 'regarding an event startling enough to cause nervous excitement'; (2) 'before there was time to contrive or misrepresent'; and (3) 'while the person was under the stress or excitement caused by the event.'" *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008) (quoting *Henyard v. State*, 689 So. 2d 239, 251 (Fla. 1996)).

First, Destefano had been shot during the course of a robbery--clearly an event startling enough to cause the nervous excitement required by section 90.803(2). HN5 It is not necessary that the statement illustrate the startling event; it **[**19]** is enough that the statement relate to the event. *See Johnson v. State*, 969 So. 2d 938, 950 (Fla. 2007). Here, Destefano's statement that the robber was a "black man wearing a black stocking cap" relates to the event that caused the startling nervous excitement.

Second, this Court has explained that HN6 "[w]hile an excited utterance need not be contemporaneous to the event, it must be made while the declarant is under the stress of the startling event and without time for reflection." *Hudson*, 992 So. 2d at 107 (quoting *Hutchinson v. State*, 882 So. 2d 943, 951 (Fla. 2004)). The statement must be made without time for reflective thought because it is the lack of time to contrive or misrepresent the facts that provides the reliability for such statements. *See Hudson*, 992 So. 2d at 107. Although the exact amount of time that passed between when Destefano was shot and when he made his statement to Officer Grecco is unclear, "[t]he test regarding the time elapsed is not a bright-line rule of hours or minutes." *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995); *see also* Edward W. Cleary, *McCormick on Evidence*, § 297, at 856 (3d ed. 1984). We have held that the "[f]actors that the trial judge can **[**20]** consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." *Hudson*, 992 So. 2d at 108 (quoting *Williams v. State*, 967 So. 2d 735, 748 (Fla. 2007)).

[*30] In *Williams*, we held that the trial court did not abuse its discretion in admitting as an excited utterance a statement made by a victim twenty minutes after the incident. In so holding, we noted that the trial court had before it evidence of the physical and mental condition of the declarant and the characteristics of the event. *See Hudson*, 992 So. 2d at 108 (reiterating factors that may be considered in determining if the declarant is still under the stress of the event). This evidence included the fact that the declarant was "still grievously injured," having suffered multiple stab wounds and punctured lungs, and was "upset, and fading in and out of consciousness" at the time of the statement. *Williams*, 967 So. 2d at 749.

In *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), the defendant kidnapped a mother and her two children. He raped the mother, shot her four **[**21]** times and left her for dead, although she ultimately survived. He took the children to another location where he shot and killed them both. We held that the mother's statements to a police officer were properly admitted as excited utterances even though she made her statements several hours after the shooting. *Id.* at 251. After being left on the side of the road, the mother lost consciousness for a few hours. When she regained consciousness, she made her way to a nearby house where she collapsed on the porch and the occupants called the police. When an officer arrived, the victim was hysterical but

coherent when she told him about the event. At trial, the officer was permitted to testify that immediately after his arrival, she told him that two young black males raped and shot her and then took her children. We held the officer's testimony was proper as an excited utterance exception to the hearsay rule and stated, HN7 "While the length of time between the event and the statement is a factor to be considered in determining whether that statement may be admitted under the excited utterance exception, the immediacy of the statement is not a statutory requirement." *Id.* (citation omitted).

Here, **[**22]** although some amount of time passed between the shooting and the time that Destefano spoke to the police officer, the medical examiner testified that Destefano was bleeding internally and that someone in his condition would become increasingly light-headed and dizzy. Additionally, Officer Grecco testified that Destefano was having difficulty breathing and appeared "scared, frightened, and terrified." The officer added that Destefano "wasn't verbal [or] speaking at all" within minutes of Grecco's arrival at the scene. Given Destefano's physical and emotional condition following his devastating injuries, the evidence clearly indicates he was still under the effect of the startling events of that early morning, thus supporting a conclusion that he did not engage in reflection prior to making the statement. We therefore conclude that the statement qualified as an exception to hearsay pursuant to section 90.803(2) and that the trial court did not err in finding the statement to be an excited utterance.

B. Dying Declaration Exception

We now examine whether Destefano's statement was admissible under the dying declaration exception to the hearsay rule. HN8 Pursuant to section 90.804(2)(b), Florida Statutes **[**23]** (2007), and this Court's prior rulings, the deceased must have known and "appreciated his condition as being that of an approach to certain and immediate death," although it is not necessary that the declarant "make express utterances" that he would never recover. *Henry v. State*, 613 So. 2d 429, 431 (Fla. 1992) (quoting *Lester v. State*, 37 Fla. 382, 20 So. 232, 233 (Fla. 1896)). "Rather, the court should satisfy itself, on the totality of the **[*31]** circumstances," that the deceased knew he was dying. *Id.* (quoting *Lester*, 20 So. at 233). This Court has said the "absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, are a preliminary foundation that must always be laid to make such declarations admissible." *McRane v. State*, 142 Fla. 240, 194 So. 632, 636 (Fla. 1940) (quoting *Lester*, 20 So. at 233). Further, the declarant must not have merely considered himself in imminent danger, but he must have "believed he *was without hope of recovery*." *Dixon v. State*, 13 Fla. 636, 640 (1870); *see also Morris v. State*, 100 Fla. 850, 130 So. 582, 584 (Fla. 1930) ("[The declarant] knew unquestionably, that he had been mortally wounded.").

Thus, under our established precedent, in order for Destefano's **[**24]** statement to be considered a dying declaration, he must have believed his death was imminent. A clear example of an admissible dying declaration is found in *Williams*, where we concluded that the trial court did not err in admitting a statement as a dying declaration. There, the evidence showed that the declarant, who suffered grievous injuries, expressed numerous times that she believed she was dying and that she would not survive her injuries. *Williams*, 967 So. 2d at 749. In the present case, although the medical examiner testified that someone in Destefano's condition would "know something was radically wrong," the evidence showed that he also knew the ambulance had arrived and that he was receiving medical attention. There is no evidence suggesting that Destefano lacked all hope of recovery or believed his death was imminent. Thus, we must conclude that the trial judge erred in admitting the statement as a dying declaration.

C. Crawford v. Washington

Even though Destefano's statement qualified as an excited utterance exception to the hearsay rule, its admission resulted in a violation of Hayward's rights under the Confrontation Clause. HN9 "In all criminal prosecutions, the accused shall **[**25]** enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Supreme Court laid the analytical framework for a Confrontation Clause violation when it stated HN10 "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law

required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. [7] Prior to *Crawford*, the issue was controlled by *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), which held that a hearsay statement could be introduced in a criminal trial without resulting in a Confrontation Clause violation if it was shown that the declarant was unavailable and the out-of-court statement bore adequate indicia of reliability. In *Roberts*, the Court focused on the reliability of the statement, concluding that a statement had "adequate indicia of reliability if it either fell within a firmly rooted hearsay exception or it bore 'particularized guarantees of trustworthiness.'" *Blanton v. State*, 978 So. 2d 149, 154 (Fla. 2008) (quoting *Roberts*, 448 U.S. at 66).

FOOTNOTES

[7] The State also argues that the common law doctrine of forfeiture by wrongdoing allows the introduction of statements by a witness **[**26]** if the witness is unavailable to testify due to the "means or procurement" of the defendant. *See Giles v. California*, 128 S. Ct. 2678, 2683, 171 L. Ed. 2d 488 (2008). The State urges us to hold that forfeiture applies in Hayward's case because he "procured" Destefano's absence by killing him. We decline to adopt such a theory.

The Supreme Court's decision in *Crawford* abandoned the *Roberts* indicia of reliability **[*32]** test and held that HN11 the introduction of a hearsay statement will result in a violation of the defendant's Sixth Amendment right to confrontation if (1) the statement is testimonial; (2) the declarant is unavailable; and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. "Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* This Court has also recognized that "[t]he mere fact that evidence meets the requirements of an exception to the hearsay rule does **[**27]** not necessarily mean it is admissible as evidence." *State v. Lopez*, 974 So. 2d 340, 345 (Fla. 2008).

In *Davis*, the United States Supreme Court held that the statements made by the victim to a 911 operator during the course of an attack were not testimonial, and were therefore admissible, because the victim "simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828. In the companion case of *Hammon v. Indiana*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (No. 05-5705), the victim was waiting on the front porch and the assailant was inside when the police arrived. The victim was escorted to a separate room where she was questioned and filled out a complaint affidavit about the incident. The Supreme Court held that the victim's statement in *Hammon* was testimonial because "[t]here was no emergency in progress" and the "primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.* at 829-30.

HN12 The Supreme Court in *Davis* discussed other factors that may be considered when determining whether a statement is testimonial, such as (1) whether the declarant was speaking about events that were currently happening or circumstances that could currently be responded to, **[**28]** as opposed to events that were clearly in the past and could only be investigated and litigated; (2) whether the declarant was facing an ongoing emergency (describing or seeking help for current physical danger); and (3) whether the setting of the declarant's statement was a perilous crime scene or a safe location. Thus, we shall examine the evidence in this case in light of the above-mentioned factors. As discussed below, based on application of the three factors set forth in *Davis*, we conclude that while Destefano's statement qualifies as an excited utterance, its admission violated the Confrontation Clause because it was testimonial.

First, Destefano was speaking about past events that could only be investigated or litigated. He had already been robbed and shot, and his statement described that past occurrence. *See Davis*, 547 U.S. at 827 (distinguishing between the interrogation in *Davis* from *Crawford* on the basis that in *Davis*, the victim "was speaking about events *as they were actually happening*, rather than

'describ[ing] past events'" (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

Second, at the time Destefano made his statement, he was receiving medical attention and was **[**29]** being prepped for transport to a hospital. Officer Grecco already knew that he was responding to a shooting incident, and Destefano's statement simply answered Officer Grecco's question as to "what happened." The statement was not meant to help the officer respond to an emergency; rather, it was aimed at assisting **[*33]** the officer in investigating, locating, and prosecuting the perpetrator. "When we said . . . that 'interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had immediately in mind . . . interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826 (quoting *Crawford*, 541 U.S. at 53).

Third, Destefano found help approximately one block away from the scene of the attack and his assailant had already left, heading in the opposite direction. *See, e.g. People v. Cage*, 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205, 217-218 (Cal. 2007) (finding statements made by the victim to be testimonial in nature where the statements were made in a different location than the attack and there was no danger of further violence). Because Destefano was being attended to by numerous **[**30]** professionals, including a police officer, he was not in peril at the time of his statement.

Accordingly, given these findings, we conclude that even though Destefano's statement to Officer Grecco constituted an excited utterance, his statement was testimonial in nature, and therefore its admission into evidence violated the Confrontation Clause. [8]

FOOTNOTES

8 We have determined that Destefano's statement did not constitute a dying declaration. Therefore, we need not address whether a dying declaration might be an exception to the Confrontation Clause requirements set forth in *Crawford*.

D. Harmless Error Analysis

Even though we have determined that admission of Destefano's statement was erroneously admitted in violation of the Confrontation Clause, we conclude that the error was harmless beyond a reasonable doubt. In *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), this Court articulated [HN13] the inquiry which must be undertaken to determine if an error requires reversal or is harmless beyond a reasonable doubt. Once error has been established, "[t]he question is whether there is a reasonable possibility that the error affected the verdict." *Id.* at 1139. The burden is on the State, "as the beneficiary **[**31]** of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *Id.* at 1135. In making this analysis, the Court will consider both "the permissible evidence on which the jury could have legitimately relied" and "the impermissible evidence which might have possibly influenced the jury verdict." *Id.*

Given the strength and nature of the other evidence connecting Hayward to the crime on which the jury could have relied, we find that there is no reasonable possibility that the admission of Destefano's statement affected the verdict. First, the statement did not specifically identify Hayward--it simply identified the perpetrator as a "black male" with a cap. Further, more than one witness provided the police with virtually the same description given by Destefano to Officer Grecco. McDowell also testified that the perpetrator was a black man with some sort of head covering or hat, and Hayward himself testified that the perpetrator was a "black guy with [a] mask on." Thus, the information that the assailant was a black man with some **[**32]** sort of head covering was properly introduced at trial through two witnesses other than Destefano, and

the jury would have heard it even if Officer Grecco had not testified. Additionally, Hayward confessed to the burglary and confirmed all the events of **[*34]** the robbery, and there was extensive forensic evidence tying Hayward to the murder. HN14 "[W]here the evidence introduced in error was not the only evidence on the issue to which the improper evidence related, the introduction can be harmless." *Hojan v. State*, 3 So. 3d 1204, 1210 (Fla. 2009); *see also Henyard*, 689 So. 2d at 251 (finding the introduction of the victim's statements through the officer's testimony constituted harmless error where the statements were also introduced through the victim's testimony). Because there was additional substantial, reliable and admissible evidence that the perpetrator was a black male with some sort of head covering, the admission of Destefano's statement was harmless beyond a reasonable doubt and Hayward is not entitled to relief on this issue.

The Police Encounter at the Rooming House, Hayward's Statements, and the Issue of Probable Cause

We now examine the evidence of Hayward's statements made both **[**33]** at the rooming house and at the police station, as well as the observations made by the police at the rooming house, to determine if introduction of any of that evidence violated Hayward's constitutional rights. We also examine Hayward's claim that the police had no probable cause to detain him.

HN15 The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. *See* U.S. Const. amend. IV; art. I, § 12, Fla. Const. Evidence obtained in violation of those constitutional protections is generally excluded. *Golphin v. State*, 945 So. 2d 1174, 1179-80 (Fla. 2006). HN16 The Fourth Amendment requires all warrantless "seizures" of a person to be founded upon at least reasonable suspicion that the individual seized is engaged in wrongdoing. *See United States v. Mendenhall*, 446 U.S. 544, 552, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (plurality opinion). However, only when the police, "by means of physical force or show of authority, [have] in some way restrained the liberty of a citizen" is there a "seizure" of that person. *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). "Seizures of the person" include both formal arrests **[**34]** and "seizures that involve only a brief detention short of traditional arrest." *Mendenhall*, 446 U.S. at 551 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975)). As the Supreme Court has observed, the inquiry in law enforcement encounter cases is whether there has been an "intrusion upon constitutionally protected rights." *Mendenhall*, 446 U.S. at 553 (plurality opinion) (quoting *Terry*, 392 U.S. at 19 n.16).

In *Taylor v. State*, 855 So. 2d 1, 14-15 (Fla. 2003), we discussed HN17 the three levels of encounter that a person may have with law enforcement: (1) a consensual encounter that involves only minimal police contact during which a citizen may either voluntarily comply with a police officer's requests or choose to ignore them and leave; (2) an investigatory stop as enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), during which a police officer may detain a citizen temporarily if the officer has a reasonable, well-founded, and articulable suspicion that a person has committed, is committing, or is about to commit a crime; and (3) an "arrest," which must be supported by probable cause that a crime has been or is being committed. "When determining whether a particular encounter **[**35]** is consensual, the Court must look to the 'totality of the circumstances' surrounding the encounter to decide 'if the police conduct would have communicated to a reasonable person that **[*35]** the person was free to leave or terminate the encounter.'" *Taylor*, 855 So. 2d at 15 (quoting *Voorhees v. State*, 699 So. 2d 602, 608 (Fla. 1997)).

HN18 In order to determine if Hayward's Fourth Amendment rights were violated, we must first determine if and when Hayward was "detained." We do so by dividing the police encounter with Hayward into four time frames: (1) the initial encounter when Hayward exited the bathroom into the hallway inside the rooming house; (2) the instance when Detective Flaherty asked Officer Mace to take Hayward outside; (3) the instance outside the rooming house when Hayward asserted that he had actually been robbed and shot, not stabbed; and (4) the official statement made by Hayward at the police station after having been advised of his *Miranda* rights. We will

also discuss whether there was probable cause to detain him and whether his Fourth Amendment rights were violated during any of these police encounters.

A. The First Time Frame: In the Hallway

Hayward's initial encounter with **[**36]** the police occurred at Smith's rooming house after he stepped out of the bathroom and into the hallway, which was occupied by a number of police officers. Hayward asserts that due to the number of officers, the fact that he stepped directly into the group, and that a rifle or shotgun was present (although not aimed at anyone), the entire police encounter was nonconsensual from the start. He argues that under these circumstances, his statements and actions were not voluntary, but rather resulted from compelled acquiescence to the apparent authority of the police and that the encounter was an "arrest." Moreover, Hayward argues that the police had no physical evidence linking him to the crime, no murder weapon, and "nothing" putting him at the scene of the crime, thereby rendering his arrest without probable cause. We disagree.

Applying the three-level police-encounter criteria set forth in *Taylor*, we conclude that Hayward's initial encounter with the police inside Smith's rooming house was consensual. While the police were clearly looking for a suspect (a black man with a gunshot wound to his hand), they did not know Hayward was in the bathroom and did nothing to compel him to come out **[**37]** of the bathroom into the hallway. Rather, Hayward emerged from the bathroom of his own accord. After the police inquired about his bandaged hand, Hayward and Smith indicated that Smith had stabbed him following a domestic dispute. When Hayward removed his bandage, it was in response to Officer Mace simply asking if he could take a look at it. At no point did Officer Mace, or any other member of law enforcement, have a weapon drawn or demand to see the wound. Accordingly, the initial report that Hayward's wound was the result of a stabbing incident and the police officer's testimony that the wound appeared to be an infected gunshot wound, not a stab wound, were properly admitted.

B. The Second Time Frame: Stepping Outside with Officer Mace

We next examine the level of police encounter associated with the request that Officer Mace and Hayward step outside of the rooming house while Detective Flaherty spoke with Smith. Detective Flaherty testified that Smith appeared very nervous and he thought she might want to say something to the officers but was afraid to do so in Hayward's presence. Considering the assertion that Hayward sustained the wound on his hand during a domestic dispute with **[**38]** Smith, the officers reasonably separated Smith and Hayward. Thus, when Hayward and Officer Mace **[*36]** stepped outside while Detective Flaherty and Smith spoke, this action was not a detention. Further, since a crime had allegedly been committed *against* Hayward by Smith (i.e., that Smith had stabbed him), Officer Mace's subsequent request that Hayward come to the station to discuss "the cut" was not a detention.

C. The Third Time Frame: Sudden Change of Story as to the Wound

Next, we examine the circumstances surrounding the handcuffing of Hayward for the trip to the police station and his subsequent statement. Once Hayward agreed to accompany Officer Mace to the police station, he was handcuffed and placed in the back seat of the patrol car. Prior to handcuffing Hayward, Officer Mace explained to him that it was police policy to handcuff all persons transported in police vehicles. As he was entering the vehicle, Hayward suddenly stated that he "wasn't going to lie." He then told Officer Mace that he had been robbed and shot.

The State concedes that handcuffs are restraining devices but contends that Hayward was not detained because the use of handcuffs during transport was a routine safety **[**39]** measure followed by the police. Although Hayward was in the process of being handcuffed pursuant to police policy at the time of his statement, the totality of the circumstances, including the purpose of the officer's conduct and the spontaneous nature of Hayward's statement, demonstrate that his statement was not the result of any alleged illegal detention. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). In addition to this Fourth Amendment

analysis, we must also consider any Fifth Amendment implications. *See Voorhees*, 699 So. 2d at 611. Hayward agreed to accompany the police to the station for further questioning and his statement was clearly spontaneous and voluntary and thus not the product of interrogation. *See Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999) (HN19 "Interrogation takes place . . . when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response.") (quoting *Traylor v. State*, 596 So. 2d 957, 966 n.17 (Fla. 1992)); *see also Johnson v. State*, 660 So. 2d 648, 659 (Fla. 1995) (concluding that the defendant's statement was voluntary and spontaneous and not elicited by any interrogation); *State v. Foster*, 562 So. 2d 808, 810 (Fla. 5th DCA 1990) (holding that HN20 spontaneous statements are not always the product of an interrogation); *Rosher v. State*, 319 So. 2d 150, 152 (Fla. 2d DCA 1975) ("Spontaneous statements are admissible in evidence [when they] are not the product of interrogation.") **[**40]** . Based on the foregoing, we conclude that there is no merit to Hayward's claim that his voluntary, unsolicited statement that he had been shot, not stabbed, should have been suppressed.

D. The Fourth Time Frame: Hayward's Statement at the Police Station

Once at the station, Officer Mace took Hayward's handcuffs off, but secured him by an ankle bracelet to a table in an interview room, where he was advised of his *Miranda* rights. Thereafter, Hayward agreed to discuss the incident and gave the officers several versions of how his hand was injured. While we agree with Hayward that he was clearly "detained" when he made these statements, we find that the statements were properly admitted into evidence because they were made after he had been advised of his *Miranda* rights and after he indicated that he wished to **[*37]** proceed with the questioning. [9]

FOOTNOTES

9 Of course, HN21 constitutional errors committed prior to an official arrest cannot be "cleansed" by the simple remedy of administering *Miranda* warnings later. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (subsequent *Miranda* warnings do not cure Fourth Amendment violations). However, since we have found no constitutional violations in the **[**41]** admission of evidence obtained pursuant to Hayward's police encounter at the rooming house prior to his being given such warnings, there was no violation and thus no need for any "cleansing."

E. Probable Cause

Finally, we reject Hayward's contention that the police did not have probable cause to detain or arrest him, had they actually chosen to do so at the rooming house. In *Walker v. State*, 707 So. 2d 300 (Fla. 1997), we explained:

> HN22 Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Schmitt v. State*, 563 So. 2d 1095, 1098 (Fla. 4th DCA 1990).

Id. at 312. Utilizing these criteria here, we conclude that the police had probable cause to detain Hayward for further questioning. By the time the police encountered Hayward **[**42]** at the rooming house, they had already interviewed McDowell, who described the assailant as being a black man with what appeared to be a bleeding left hand, who fled the scene in the general direction of Smith's rooming house. McDowell's statements, including the description of the different sounds of the gun shots, along with Destefano's statement to the officer that he shot at

his assailant, provided reasonable grounds to believe that Destefano's assailant had in fact been shot. [10] Smith's rooming house was only a few blocks away from the crime scene, and police found a blood trail leading in that general direction. Only two days after the shooting, the police were notified that a person at the rooming house had a possible gunshot wound to the hand and had been asking residents to sew it up. When the police saw Hayward's wound, they observed that it looked like a gunshot wound. Finally, when Hayward's story drastically changed during the encounter, it became clear that he had lied about the cause of the injury to his hand. Based on the totality of the circumstances, the police had reasonable grounds, and therefore probable cause, to conclude that a felony had been committed and that **[**43]** Hayward had committed it. Thus, relief is denied on this claim.

FOOTNOTES

10 [HN23] Hearsay can be used to establish probable cause to arrest, even if it may not be used at trial. *See Gerstein v. Pugh*, 420 U.S. 103, 120, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (discussing the standards of proof in various types of detentions and stating that for probable cause to arrest, hearsay may be utilized). Further, Hayward objected only to Officer Grecco's description of the attacker, not to Destefano's statement that he had shot at his attacker.

The Recorded Jail Conversations

We now turn to Hayward's assertion that the recorded conversations he had with Smith from jail were improperly admitted into evidence because the conversations were more prejudicial than probative. [11] He contends that the profane language **[*38]** he used during these conversations unduly prejudiced the jury during the guilt and penalty phases.

FOOTNOTES

11 Hayward does not contend that the calls were illegally intercepted, only that their prejudicial effect outweighed any probative value.

At trial, the State sought to play portions of two telephone calls Hayward made to Smith from the jail shortly after his arrest. Their asserted purpose was to show that Hayward had called Smith to tell her what **[**44]** he had told the officers, so that her statement would mirror his. The State also asserted that Hayward's instructions to Smith in one of the telephone calls to get rid of the "reefer," which both knew did not exist, was code instructing Smith to get rid of the murder weapon. [12] Hayward clearly knew that the calls were taped or monitored--he specifically told Smith, "They record these phones."

FOOTNOTES

12 The police had already searched Smith's apartment.

The State argued that redacting the extensive vulgarity in the tapes would leave such a void as to render them meaningless. Further, the State urged, it was significant that Hayward's language increasingly worsened as Smith failed to listen to what he was telling her to say and do. During one of the conversations between Hayward and Smith, the following colloquy took place:

> HAYWARD: Soon as you get [off] this phone, you hear me. Huh? Do you hear me, Dot? . . . Soon as you get [off] this phone . . . . Go get up Charles.
>
> SMITH: Huh?

HAYWARD: Go get up Charles, you know what I'm talking about.

SMITH: Okay. No, I can't do that.

HAYWARD: Why?

SMITH: Not-uh. No, I ain't trusting nobody, no. No. . . .

HAYWARD: I told you - -

SMITH: But I, they ain't got the gun **[**45]** though.

Although Hayward's language throughout his conversations with Smith contained extensive vulgarity, Hayward's obscenity became extreme after Smith's reference to the gun. The State argued that Hayward's explosion of anger over the use of the word "gun" constituted admissible evidence of consciousness of guilt. The trial court concluded that "the relevance [of the tapes] is not outweighed by any prejudicial [e]ffect" and allowed the tapes to be played for the jury, with a transcript provided for their review during the playing of the tapes. Before we begin our analysis of this issue, we review the test to be applied in such cases.

HN24 Admission of probative but potentially prejudicial evidence is controlled by section 90.403, Florida Statutes. It states in pertinent part:

> HN25 **90.403 Exclusion on the grounds of prejudice or confusion**--Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

§ 90.403, Fla. Stat. (2007). In *State v. McClain*, 525 So. 2d 420, 422 (Fla. 1988), we explained the balancing test a trial court must perform under section 90.403 **[**46]** in determining whether relevant evidence is admissible against a defendant at trial. We stated:

> HN26 This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence.

[*39] At issue in this case was the identity of Destefano's killer. Central to this issue was the presence of Hayward's blood on a number of items found at or near the crime scene. As noted earlier, Hayward provided several explanations for the presence of his blood at the crime scene. The tapes, including the language used as well as the context in which the conversations took place, provided relevant information for the jury to consider when assessing the reliability of his explanations. Professor Ehrhardt explained the application of section 90.403 under these circumstances as follows:

> HN27 Evidence of conduct or speech of the accused which demonstrates a consciousness of guilt is relevant since it supplies the basis for an inference that the accused is guilty of the **[**47]** offense.

Charles W. Ehrhardt, *Florida Evidence* § 403.1, at 189 (2008 ed.).

Here, Hayward's thinly disguised attempts to instruct Smith to dispose of the murder weapon, his futile attempts to convey to Smith the statements he had given to the police, and his explosive reaction to Smith's use of the word "gun" in response to one of his statements were highly relevant to his consciousness of guilt and rebutted his claim that he merely found the gun at the scene. Accordingly, we conclude that the trial court correctly determined that any prejudice

caused by Hayward's extensive use of profanity during his taped conversations with Smith was outweighed by the highly probative value that such evidence offered. Moreover, the jurors were well aware of Hayward's propensity to use profanity since they previously heard and saw his videotaped statement, which also contained similar profanity.

Although we have concluded that admission of the tapes was not error, even if it had been, such error would have been harmless. Under *DiGuilio*, HN28 in conducting a harmless error analysis, the focus is on the effect on the trier of fact. 491 So. 2d at 1139. The question to be considered is whether there is a reasonable **[**48]** possibility that the error affected the verdict, with the burden being on the State to demonstrate beyond a reasonable doubt that it did not. *Id*. Given the strength of the evidence connecting Hayward to the crime, we find that there is no reasonable possibility that the profanity used by Hayward during his taped conversations with Smith affected the verdict. Hayward confessed to the burglary of Destefano's car and confirmed all of the events of the robbery and murder while claiming he was watching someone else do the shooting. McDowell gave testimony of his own eyewitness account, and there was extensive forensic evidence connecting Hayward to the murder.

We also conclude that any impact that the admission of the tapes may have had on the jury during the penalty phase was insignificant and did not affect the jury's death sentence recommendation. Even if the language used by Hayward portrayed him in a derogatory light, any possible prejudice would have been overshadowed by the significant aggravating circumstances: (1) that the defendant had prior violent felony convictions; and (2) that the murder was committed during the course of a robbery; merged with (3) that it was committed for **[**49]** pecuniary gain. HN29 The prior violent felony aggravator has been regarded as one of the weightiest aggravators. *See Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008) (reiterating that the prior violent felony aggravator is one of "the most weighty in Florida's sentencing calculus" (quoting *Sireci v. Moore*, 825 So. 2d 882, 887-88 (Fla. 2002))). Moreover, in Hayward's case, the trial court found a complete absence of statutory mitigation **[*40]** and found only relatively weak nonstatutory mitigation.

Given the evidence of weighty aggravators presented to the jury, there is no reasonable possibility that the manner in which Hayward spoke to his girlfriend and the profanity he used affected the jury's sentencing recommendation or the trial court's ultimate decision to sentence Hayward to death. As the trial court noted, "each statutory aggravator, when considered alone, outweighs the totality of the mitigating circumstances" and justifies a sentence of death. Thus, the error, if any, was harmless and relief is denied on the claim.

PROSECUTORIAL COMMENTS

We next address Hayward's claim that reversible error occurred when the State improperly commented on Hayward's character and drew a comparison between **[**50]** his worth and that of Destefano. Prior to the commencement of the penalty phase, Hayward moved to prevent or limit the presentation of victim impact evidence before the jury. Among other things, he objected to the use of evidence which "may invite jurors to gauge the relative worth of particular victims' lives." When the State agreed to refrain from using any such information to make "characterizations and opinions about . . . the defendant," the trial court denied the defense motions and allowed victim impact statements to be read to the jury. During the victim impact portion of the penalty phase, Destefano's mother talked about how her son had worked hard and saved up to buy a Harley-Davidson motorcycle, which had been his dream.

During the penalty phase closing argument, the prosecutor reminded the jury about how Destefano had worked toward his goal of buying a Harley-Davidson, and then stated, in part, as follows:

> One thing we learned about Danny was that Danny set his sights on something and then worked towards that . . . goal. . . . Because he had a goal in mind. And he recognized that choices, you see, choices that he made in his life will take him to his goal. Because in the end, **[**51]** ladies and gentlemen, it all comes down to choices

> we make. As human beings we have free will. We have the ability to control our destiny. When you make a choice, you may make a choice that is well [intentioned] and bad things happen. And we recognize it that unfortunately you may have to pay the consequences for that. Sometimes you make decisions, good things happen, they turn out the way you want.
>
> Sometimes you make decisions in your life for the wrong reasons but knowing why. Steven Hayward did just that. Steven Hayward sits at this table today not as a result of anything anybody did to him, any of the conditions in his life, but because of very simply he made some choices. He exercised his free will and his free will brings him here today and this places him in this condition of life.

However, no contemporaneous objection was made to this argument.

HN30 In order to preserve a claim of improper prosecutorial argument, "[c]ounsel must contemporaneously object to improper comments." *Bailey v. State*, 998 So. 2d 545, 554 (Fla. 2008) (quoting *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007)), *cert. denied*, 129 S. Ct. 2395, 173 L. Ed. 2d 1307 (2009). In this case, Hayward failed to make an objection either during **[**52]** or after the prosecutor's comments concerning the life choices of both Destefano and Hayward. Thus, HN31 this issue is unpreserved and fundamental error must be shown for resentencing to be required. *See Simpson v. State*, 3 So. 3d 1135, 1146 **[*41]** (Fla. 2009) (recognizing the general rule that failure to make a contemporaneous objection to improper closing argument "waives any claim concerning such comments for appellate review" unless "the unobjected-to comments rise to the level of fundamental error") (quoting *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000)), *petition for cert. filed*, No. 08-10414 (U.S. May 11, 2009). "This is a high burden which requires an error that 'goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *Bailey*, 998 So. 2d at 554 (quoting *Johnson v. State*, 969 So. 2d 938, 955 (Fla. 2007)).

HN32 Fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Simpson*, 3 So. 3d at 1146 (quoting **[**53]** *Brooks*, 762 So. 2d at 898-99). HN33 Error during the penalty phase is fundamental if it is "so prejudicial as to taint the jury's recommended sentence." *Jones v. State*, 949 So. 2d 1021, 1037 (Fla. 2006) (quoting *Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003)). We first examine whether the prosecutor's argument was improper and then turn to the question of whether the improper argument constituted fundamental error.

The prosecutor's comments were based on victim impact evidence admitted during the penalty phase. HN34 Victim impact evidence is admissible, but its purpose is "to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla. Stat. (2007); *see also Wheeler v. State*, 4 So. 3d 599, 607 (Fla. 2009), *petition for cert. filed*, No. 08-11026 (U.S. May 28, 2009); *Franklin v. State*, 965 So. 2d 79, 98 (Fla. 2007); *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004). Section 921.141 specifically states that "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." § 921.141(7), Fla. Stat. Hayward argues **[**54]** that the State did not follow the law and improperly used victim impact information to compare the characters and choices of Destefano and Hayward during the penalty phase closing argument. We agree. Although the victim impact evidence itself was proper, the prosecutor's use of it in his closing argument--comparing the choices made by the victim and those made by Hayward--was improper.

The prosecutor characterized Destefano as a goal-oriented, hard worker who made important choices in his life, followed by a statement that Hayward had also made choices and "Steven Hayward sits at this table today not as a result of anything anybody did to him, any of the conditions in his life, but because of very simply he made some choices." This is clearly a comparison of the choices made by the victim versus the choices made by Hayward, which is not within the scope of the victim impact statute.

Recently, this Court examined a similar claim in *Wheeler*, where victim impact evidence was used to comment on and compare the choices made by the victim and the defendant. In *Wheeler*, the State made the following comment in closing argument during the penalty phase:

> The choices that Jason Wheeler made had **[**55]** a devastating impact on not just the family of Deputy Koester, but his family as well. If you tried to sit and count the number of people that have been affected by what was done, it numbers in the dozens . . . .

Id. at 609-10. At this point, defense counsel objected and the trial court warned the prosecutor to make clear he was not arguing victim impact based on the number of **[*42]** persons affected. The prosecutor then stated:

> But you see, the rules tell you that that's not what you base your decision on. That's the whole purpose of the process is for you to try to look objectively at the choices that were made and what is the just consequence of those choices.

Id. at 610. The defense did not object to this comment, or to the following additional comment:

> But within all this realm of choicelessness, we do choose how we will live. Either courageously or cowardly, or honorably or dishonorably, with purpose or a drift [sic], we decide what's important and trivial in life. We decide what makes us significant is either what we do or what we refuse to do.
>
> But no matter how indifferent the entire universe may be to these choices, these choices and decisions are ours to make. We decide. We choose. And **[**56]** as we decide and as we choose, our destinies are formed. That's what I want you to look at as we walk through this case and these facts and these aggravating and mitigating circumstances.

Id. (quoting "writer Joseph Epstein"). We concluded in *Wheeler* that these statements constituted prosecutorial error but, as was the case here, no contemporaneous objection was made. We found that the comparison was improper but that the argument did not to rise to the level of fundamental error.

In the instant case, the prosecutor's statement comparing Destefano's choices in life to Hayward's choices are similar to the improper comparisons made by the prosecutor in *Wheeler*. In both instances, the prosecutors improperly used victim impact information to compare the characters and choices of the victims and the defendants. Accordingly, we find that the prosecutor's statement constituted prosecutorial error in this case. We must now determine whether the conduct was so egregious as to rise to the level of fundamental error requiring resentencing.

HN35 Reversal for improper prosecutorial comment is not automatic, *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984), and "[i]n the penalty phase of a murder trial, **[**57]** resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985). In this case, HN36 because Hayward failed to make a contemporaneous objection to the erroneous argument, he must also demonstrate the error is fundamental; that is, he must demonstrate that the error "reaches down into the validity of the trial itself" and that a sentence of death "could not have been obtained without the assistance of the alleged error." *Simpson*, 3 So. 3d at 1146 (quoting *Brooks*, 762 So. 2d at 898-99). In determining whether fundamental error has occurred, we review the totality of the circumstances. *Power v. State*, 886 So. 2d 952, 963 (Fla. 2004). Having reviewed the improper prosecutorial comments in the context of the entire closing argument and in light of the evidence presented in the penalty phase, we conclude that the improper prosecutorial comments in this case do not rise to the level of fundamental error. Given the strength of the evidence against Hayward and the gravity of the aggravators, we cannot say that the jury would **[**58]** not have recommended a death sentence or that the trial court would not have imposed a death sentence if the prosecutor had not made the improper victim impact comparison.

However, we feel compelled to once again voice our disapproval of this type of prosecutorial comment comparing **[*43]** the life or choices of the victim with that of the defendant. The misconduct was exacerbated by the prosecutor's acknowledgment immediately prior to the commencement of the penalty phase of the impropriety of the use of victim impact evidence in such a manner. Despite his agreement to refrain from using victim impact evidence to make "characterizations and opinions about . . . the defendant," the prosecutor proceeded to needlessly stain the record with the clearly improper remarks. As we did in *Wheeler*, we again hold that HN37 victim-defendant comparisons are improper and again "caution the State and its prosecutors to remain mindful of the limited purpose for which victim impact evidence may be introduced and to stay strictly within those parameters." *Wheeler*, 4 So. 3d at 611.

CONSTITUTIONALITY OF FLORIDA'S SENTENCING SCHEME

Hayward has also challenged Florida's sentencing scheme as unconstitutional, making three **[**59]** claims: (1) imposition of the death penalty based on an eight-to-four jury recommendation is unconstitutional; (2) the standard jury instruction for premeditation is insufficient; and (3) the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), does not allow a system in which the jury may render an advisory nonunanimous verdict. We address each claim in turn.

Hayward asserts that section 921.141, Florida Statutes (2008), Florida's capital sentencing statute, does not authorize a bare majority advisory sentence and that a bare majority jury recommendation of death is unreliable, thereby depriving him of due process. [13] Hayward's claim has no merit for two reasons. First, HN38 section 921.141 (3) makes specific reference to a sentencing recommendation by "a majority of the jury," and we have previously recognized that Florida's capital sentencing statute "allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote" whether to recommend death. *State v. Steele*, 921 So. 2d 538, 550 (Fla. 2005). Second, Hayward has provided the Court with no basis on which to find that the capital sentencing statute results in an unreliable **[**60]** or unconstitutional penalty. Therefore, Hayward's claim that his sentence is unconstitutionally unreliable is without merit and relief is denied on this claim.

FOOTNOTES

[13] Even though Hayward recognizes that the jury in this case recommended death by a vote of eight to four, which is not a "bare majority," he contends his advisory verdict was unreliable for the same reasons he argues that a "bare majority" verdict is unreliable.

Hayward also asserts that the standard instruction for premeditated murder fails to properly inform the jury about the required "premeditated design" and that there must be proof of deliberation both before and at the time of the killing. At trial, without objection from Hayward, the jury was provided with the standard jury instruction for first-degree premeditated murder. Thus, this issue has not been preserved for appeal. *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001) (HN39 "Issues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial."). However, even if the issue had been preserved, Hayward would not be entitled to relief because this Court has upheld the standard jury instructions on premeditated **[**61]** murder. *See, e.g.*, *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996) (HN40 "[T]he standard jury instructions are sufficient to explain premeditation."); *Spencer v. State*, 645 So. 2d 377 (Fla. 1994) (holding that the standard first-degree murder instruction addresses **[*44]** all of the points discussed in *McCutchen* [14] and properly instructs the jury about premeditated design). Because we have previously rejected this same claim and found the standard instruction sufficiently instructs the jury as to premeditated design, this claim is without merit.

FOOTNOTES

14 *McCutchen v. State*, 96 So. 2d 152, 153 (Fla. 1957) (holding that HN41 "a premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide and that if the party at the time was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences, the intent or design would be premeditated within the meaning of the law).

As his last constitutional challenge, Hayward contends that Florida's capital sentencing scheme under section 921.141, Florida Statutes, is unconstitutional **[**62]** based on *Ring* because it does not require that the finding of aggravators be made by a unanimous jury. He concedes that this Court has held the statute constitutional in the face of the same challenge but asks the Court to revisit its rulings.

In this case, the trial court found in aggravation that Hayward had previously been convicted of three prior violent felonies (the 1988 second-degree murder and two armed robberies). We have "repeatedly held that HN42 "where a death sentence is supported by the prior violent felony aggravating factor, as is the case here, Florida's capital sentencing scheme does not violate *Ring*." *Peterson v. State*, 2 So. 3d 146, 160 (Fla. 2009), *petition for cert. filed*, No. 09-5057 (U.S. June 25, 2009). Therefore, Hayward's challenges to Florida's capital sentencing scheme are without merit.

SUFFICIENCY OF THE EVIDENCE

Hayward has specifically challenged the sufficiency of evidence as to identification, premeditation, and whether a robbery was actually accomplished. 15 Even if Hayward had not challenged the sufficiency of evidence, HN43 "this Court has a mandatory obligation to review it in every case in which a sentence of death has been imposed regardless of whether the **[**63]** appellant has challenged the evidence. *See Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007); Fla. R. App. P. 9.142(a)(6). HN44 "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006) (quoting *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001)).

FOOTNOTES

15 The conviction of robbery was utilized in finding an aggravator and was the underlying felony for the charge of first-degree felony murder.

HN45 "[I]f the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of each offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). Nonetheless, contrary to Hayward's assertion, the evidence in his case was not purely circumstantial. Thus, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases and unnecessary to require the State to disprove Hayward's hypothesis that he was merely **[**64]** an observer. Moreover, even if this case were purely circumstantial, we would find that Hayward's hypothesis of innocence was disproven by competent, substantial evidence.

[*45] The evidence showed that Destefano told his assailant, "I don't have no more," after which Destefano was brought to his knees by a shot from a .22 caliber revolver. Then, while standing above him, the assailant took aim again and shot a second time into Destefano's chest. Destefano told the police officer he shot at his assailant with his larger .357 caliber revolver and

McDowell testified he heard two gunshots followed by a louder gunshot and saw the assailant examine his bleeding hand under a streetlight. Hayward suffered a gunshot wound that same morning. Destefano also told the officer that he did not know what happened to his revolver. Shortly after the murder, Hayward sold a silver revolver that matched the description of Destefano's revolver. Additionally, Hayward had a bloody ten-dollar bill in his possession on the morning after the murder. Finally, Destefano himself told the police officer that he had been robbed. [16] This evidence establishes not only a robbery by the taking of Destefano's money at gunpoint, **[**65]** i.e., by "use of force, violence, assault, or putting in fear," [17] but it also establishes a premeditated intent to kill by the assailant. [18]

FOOTNOTES

16 Hayward did *not* object to Destefano's statement to the police officer concerning the fact that he had been robbed, but only challenged that portion of Destefano's statement concerning the description of the assailant. At trial, Hayward's attorney stated:

> We have no objection to that he was shot, where he was shot, that he was robbed, that he was delivering papers, that his car is down the street. We don't contest any of that. It's all true, so even if I had a legal objection, we're not--it's the identification of the perpetrator as being a black male wearing a stocking cap. That's still--we're limiting our objection to those two statements.

17 Section 812.13, Florida Statutes, defines robbery as follows:

> HN46 (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

§ 812.13(1), Fla. Stat. **[**66]** (2008).

18 This Court stated in *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958), that HN47 "[e]vidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted."

As to identity, Hayward took the stand at trial and admitted that he was the person McDowell saw searching Destefano's car. However, his admitted search of the victim's vehicle cannot explain the presence of the large amount of Hayward's blood found on Destefano's pants. Indeed, bloodstains were found on the pants in many varied patterns: spattered horizontally, "dripped" from above, and "wiped" or crushed into the fabric of Destefano's back pockets. Nor can the presence of Hayward's blood on Destefano's pants be attributed to a careless police officer handling the evidence. Further, given Hayward's multiple versions of what happened, the jury reasonably discounted his "other robber theory." Taken together, this provided competent, substantial evidence of identity and rebutted Hayward's theory of innocence. **[**67]** [19] Therefore, we conclude the **[*46]** evidence is sufficient to support the convictions in this case.

FOOTNOTES

19 However, even if premeditation had not been proven, the conviction would still be proper under felony murder as there is factual support for that theory of prosecution and the jury in Hayward's case was instructed on both premeditated and felony murder. *See Mungin v. State*,

689 So. 2d 1026, 1030 (Fla. 1995) (HN48 even if there is or could be error on one theory, if another theory of murder is factually supported, there is no need for reversal).

PROPORTIONALITY

Although Hayward does not assert that the sentence is disproportionate, HN49 we review every death sentence for proportionality "regardless of whether the issue is raised on appeal." *England v. State*, 940 So. 2d 389, 407 (Fla. 2006); *see also* Fla. R. App. P. 9.142(a)(6). In reviewing proportionality, the Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996). Therefore, in deciding whether death is a proportionate penalty, the Court makes "a comprehensive analysis in order to determine whether **[**68]** the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003) (citations omitted). Accordingly, the Court considers the totality of the circumstances and compares the case with other similar capital cases. *See Duest v. State*, 855 So. 2d 33 (Fla. 2003). This analysis "is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). Rather, this entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998).

Further, in a proportionality analysis, this Court will accept the weight assigned by the trial court to the aggravating and mitigating factors. *See Bates v. State*, 750 So. 2d 6, 12 (Fla. 1999). We "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent substantial evidence in the record.'" *Blackwood v. State*, 777 So. 2d 399, 412-13 (Fla. 2000) **[**69]** (quoting *Spencer v. State*, 691 So. 2d 1062, 1064 (Fla. 1996)).

The jury recommended death by an eight-to-four vote. The trial court found in aggravation: (1) prior violent felony (based on three prior violent felonies including second-degree murder) which was given great weight; and (2) that the murder was committed while Hayward was engaged in a robbery, which was merged with the pecuniary gain aggravator and given great weight. These aggravators were weighed against eight nonstatutory mitigating factors which were given very little to some weight: (1) Hayward could have gotten a life sentence (very little weight); (2) he grew up without a father (some weight); (3) he was loved by his family (little weight); (4) he had academic problems (little weight); (5) he obtained a GED in prison (little weight); (6) he would make a good adjustment to prison (little weight); (7) he had financial stress at the time of the crime (little weight); and (8) he had some capacity for rehabilitation (little weight).

This Court has found the death sentence proportionate in other shooting deaths with similar aggravation and mitigation. In *Consalvo v. State*, 697 So. 2d 805, 820 (Fla. 1996), the Court affirmed **[**70]** the death sentence where the aggravators were that the murder was committed during the course of a burglary and to avoid escape. These aggravators were weighed against some nonstatutory mitigation. In *Miller v. State*, 770 So. 2d 1144, 1150 (Fla. 2000), the Court upheld the death sentence where it found a prior violent felony and that commission of the murder occurred during a robbery, which were weighed against ten nonstatutory mitigators. In **[*47]** *Lebron v. State*, 982 So. 2d 649 (Fla. 2008), the gunshot murder was committed during the course of a robbery. The jury recommended death by a vote of seven to five and the trial court found in aggravation that Lebron had a prior violent felony and that the murder was committed during a robbery and for financial gain. The court found seven nonstatutory mitigators, which were given "very little weight" to "some weight." Because the mitigation in *Lebron* was not substantial and was far outweighed by the significant aggravation, just as in the instant case, this Court found the death sentence proportionate and affirmed. *Id.* at 668. Similarly, we conclude that the death sentence in this case is proportionate and affirm.

CONCLUSION

For all the foregoing **[**71]** reasons, we affirm Hayward's convictions for first-degree murder, robbery with a deadly weapon, burglary of a conveyance while armed, and possession of a firearm by a convicted felon. [20] We also affirm his sentence of death.

FOOTNOTES

20 Although Hayward does not separately challenge his convictions for burglary of a conveyance while armed and possession of a firearm by a convicted felon, we find sufficient evidence to affirm those convictions as well.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

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*933 So. 2d 111, *; 2006 Fla. App. LEXIS 8552, **;*
31 Fla. L. Weekly D 1501

FRANK R. MARIANO, JR., Appellant, v. STATE OF FLORIDA, Appellee.

No. 4D04-1852

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

933 So. 2d 111; 2006 Fla. App. LEXIS 8552; 31 Fla. L. Weekly D 1501

May 31, 2006, Decided

SUBSEQUENT HISTORY: [1]** Released for Publication August 3, 2006.
Rehearing denied by Mariano v. State, 2006 Fla. App. LEXIS 13323 (Fla. Dist. Ct. App. 4th Dist., Aug. 3, 2006)
Review denied by State v. Mariano, 2006 Fla. LEXIS 2652 (Fla., Oct. 27, 2006)

PRIOR HISTORY: Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Dwight L. Geiger, Judge; L.T. Case No. 03-1258 CFA.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed his conviction by the Circuit Court for the Nineteenth Judicial Circuit, Martin County (Florida) for one count of attempted second degree murder of his former girlfriend. Defendant argued that the trial court erroneously allowed impeachment of appellant on an irrelevant collateral matter and admitted hearsay statements under the excited utterance exception to the hearsay rule.

OVERVIEW: The police saw a car drive by with the passenger door open and defendant's former girlfriend, waving and screaming, and trying to jump out. After the car stopped, one officer secured defendant while another talked with the victim. Three officers talked with the victim and testified to the same explanation of events relayed to them by her. In addition, defendant's sister testified that defendant's girlfriend called about 30 to 90 minutes later, hysterical, and told her what happened. Both defendant's and the girlfriend's testimony minimized his culpability. The State impeached defendant by introducing letters he wrote after the incident threatening his former girlfriend's boyfriend. The appellate court held those letters were improper. The interval between the event and the statement to defendant's sister was long enough to permit reflective thought, the statement was inadmissible as the mere fact that the girlfriend was still upset was not sufficient to show that reflective thought had not occurred. An officer's testimony as to the girlfriend's statement was improper as there was no evidence she blurted out statements, but merely responded to the officer's questions.

OUTCOME: The judgment of the trial court was reversed and the matter was remanded for a new trial.

CORE TERMS: utterance, excited, deputy, reflective, knife, door, startling, admissible, narrative, kill, impeachment, boyfriend's, declarant, harmless, hearsay, driving, evening, scene, collateral matter, excited state, inadmissible, violence, objected, crying, drive, upset, degree murder, past event, girlfriend, collateral

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Evidence > Testimony > Credibility > Impeachment > General Overview

Evidence > Testimony > Examination > Cross-Examination > Collateral Matters

HN1 Where a witness is cross-examined concerning a collateral or irrelevant matter, the examiner is bound by the answer and may not subsequently impeach the witness by introducing extrinsic evidence to impeach the witness on that point. The test is whether the proposed impeachment testimony can be admitted into evidence for any purpose independent of the contradictions. There are two types of evidence that pass this test: (1) facts relevant to a particular issue; and (2) facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Relevance > Relevant Evidence

HN2 In order for evidence of a threat against a witness to be relevant, the threat must pertain to the witness's testifying about the crime or crimes for which the accused is standing trial. Without some link to the charges being tried, a general threat is not admissible to show consciousness of guilt. More Like This Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview

HN3 See Fla. Stat. 90.803(2).

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements

HN4 In order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview

HN5 Excited utterances partake of sufficient guarantees of truthfulness because a person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation. Whether the necessary state of mind exists in the declarant to qualify the statement as an excited utterance is a preliminary fact for the court to determine pursuant to Fla. Stat. § 90.105, and the court's rulings are reviewed for an abuse of discretion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview

HN6 As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of Fla. Stat. § 90.803(2).

This excited state may exist a substantial length of time after the event. Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview

HN7 In regard to an excited utterance, it is the State's burden to prove that the declarant did not engage in reflective thought. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > Criminal Trials

HN8 In regard to an excited utterance, the victim's excited state does not alone make the statement admissible. if the supposed statement, exclamation, or spontaneous utterance takes the form of a narrative of a past event, it is very well established that it may not be considered as part of the transaction or res gestae. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Spontaneous Statements > Criminal Trials

HN9 In regard to an excited utterance, a narrative of a past event is generally not considered a spontaneous statement, nor is a statement in reply to questions from law enforcement. More Like This Headnote | *Shepardize:* Restrict By Headnote

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JUDGES: WARNER, J. KLEIN, J. and BAILEY, JENNIFER D., Associate Judge, concur.

OPINION BY: WARNER

OPINION

[*113] WARNER, J.

Appellant, Frank Mariano, Jr., appeals his conviction of one count of attempted second degree murder of his former girlfriend. Because the court erroneously (1) allowed impeachment of appellant on an irrelevant collateral matter and (2) admitted hearsay statements under the excited utterance exception to the hearsay rule, we reverse.

Around 4:30 a.m. on September 13, 2003, Deputies Brochu and Rice observed a vehicle drive by with the passenger door open. Brochu saw a female, whom he identified as Ann Schaab, Mariano's former girlfriend, waving and screaming, and trying to jump out of the vehicle. Brochu directed Rice to pursue **[**2]** the vehicle. Rice turned on the patrol car lights, and the vehicle pulled over. At that point, Brochu and Rice saw Mariano and Schaab struggling in the front seat. Brochu saw Mariano hitting Schaab.

The two deputies approached the vehicle and saw that Mariano was holding a knife. Brochu drew

his gun and ordered Mariano to open his door. Mariano refused, and Brochu found that the door was locked. Brochu ordered Schaab to exit the vehicle, which she did. Brochu then broke the car window with his baton and opened the door. He ordered Mariano to drop the knife, which he immediately did. He then held Mariano at gun point while Rice talked with Schaab.

Deputies Porcelli and Siemer also arrived at the scene and assisted in removing Mariano from the car and handcuffing him. Mariano had a gaping cut on his neck and needed to be airlifted to the hospital.

Deputies Rice, Brochu, and Porcelli all testified that they spoke to Schaab at the scene at different times. All three deputies testified to the same explanation of events relayed to them by Schaab. She told them that while she was driving a drunken Mariano back to his residence, they got into an argument. Mariano took over driving the car **[**3]** and began looking for an isolated spot along the road, saying that if he could not have her, then no one would. He had a knife with him.

In addition, the state called Mariano's sister, Lorindo Chapman, who testified that a hysterical Schaab called her between 5:00 and 6:00 a.m. to tell her what had occurred. Schaab related the evening's events and told Chapman that Mariano tried to stab her and threatened to run her down. This was the only specific threat evidence introduced.

On the defense case, both Mariano and Schaab testified to a series of events that minimized Mariano's culpability. They explained that they had a twenty-year relationship, but prior to the incident in this case, they had separated. Schaab wanted the separation because she was dating someone else. On the evening of the incident, Mariano came over to Schaab's home. While he was there, Schaab's new boyfriend called. Mariano, who had been drinking, became very distraught and said that he was going to kill himself. Finally, Mariano asked Schaab to take him home, and she agreed.

While Schaab was driving, Mariano took out a knife and told Schaab that he was going to kill himself. He told her that if he could not have **[**4]** her, he did not want to live. At this point, Mariano wanted to **[*114]** drive so Schaab climbed over him and let him drive. She then saw a police car and opened her door so that she could flag it down to try to prevent Mariano from killing himself. She testified that she yelled to the police, "he's [sic] got a knife, he's going to kill himself," but the police could not hear her.

Mariano and Schaab pulled over immediately when the police came behind them, and Schaab testified that she tried to open her door. At this point, Mariano reached over and shut the door because he did not want her to leave. When he reached over, the knife came close to Schaab and Schaab grabbed the knife, resulting in the cut to her two fingers. However, they both testified that he never pointed the knife at her. Additionally, they both denied that they were ever struggling in the car.

When Schaab was about to exit the vehicle, she looked over at Mariano and saw him slash his neck. Mariano testified that because he wanted to sit there and die, he did not open his door for the police. He wanted to kill himself to show Schaab his love. When the police did open the door, he immediately dropped the knife. Mariano did **[**5]** not recall speaking to the police at this point, but he did remember getting into the helicopter to be airlifted.

Mariano was convicted by the jury of attempted second degree murder with a weapon. He was sentenced to fifteen years in prison and to pay a $ 5,000 fine. He appeals his conviction and sentence.

Impeachment with Evidence of a Collateral Matter

During cross-examination of Mariano, the state asked him if he had threatened Schaab's new boyfriend, to which he responded that he did not recall doing so. The state was then allowed to impeach him by making him read to the jury letters that he wrote to Schaab *after* the incident. These contained statements that, "I fear for his safety in time;" "[i]n which case he will pay,

whichever the case, he will pay;" "I would hunt him to the end of the earth;" "h[e] has no idea who or what I am;" and "I never quit." We conclude that it was error for the court to have permitted impeachment with this evidence involving a collateral matter.

HN1 Where a witness is cross-examined concerning a collateral or irrelevant matter, the examiner is bound by the answer and may not subsequently impeach the witness by introducing extrinsic **[**6]** evidence to impeach the witness on that point. *Caruso v. State*, 645 So. 2d 389, 394 (Fla. 1994). "The test is whether the proposed [impeachment] testimony can be admitted into evidence for any purpose independent of the contradictions. There are two types of evidence that pass this test: (1) facts relevant to a particular issue; and (2) facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency." *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990).

In *Dupont*, the defendant was charged with battery based on a fistfight. His defense was self-defense. On cross-examination Dupont denied verbally threatening the victim in an elevator during a court recess of the trial. The state then presented rebuttal testimony to prove that the elevator threat took place.

On appeal, we held that admission of the rebuttal testimony was error because it was irrelevant as it occurred several months after the fistfight. We determined that the testimony was not reputation testimony relating to his character for truthfulness, nor did it relate to any issue in the case, as the defendant had not put his character trait for **[**7]** violence in issue. We reversed, finding that the admission was harmful because the case hinged on the credibility of the defendant. Similarly, in **[*115]** *Gelabert v. State*, 407 So. 2d 1007 (Fla. 5th DCA 1981), the fifth district held that evidence of collateral matters was inadmissible and not harmless, because it was evidence of bad character and a propensity toward violence.

The state contends that because Mariano was charged with attempted first degree premeditated murder, it requires that the state prove premeditation, and this collateral evidence was relevant to premeditation. However, the cases it cites for the proposition that threats to the victim or to another are proper evidence to show motive and intent are distinguishable, because they involve threats made prior to the criminal act in question. *See Wilchcombe v. State*, 842 So. 2d 198 (Fla. 3d DCA 2003); *Brown v. State*, 611 So. 2d 540 (Fla. 3d DCA 1992).

The state further argues that the evidence of the threat against the boyfriend is admissible because the boyfriend was listed as a trial witness. However, HN2 "in order for evidence of a threat against a witness to be relevant, the **[**8]** threat must pertain to the witness's testifying about the crime or crimes for which the accused is standing trial." *Ford v. State*, 801 So. 2d 318, 320 (Fla. 1st DCA 2001). "Without some link to the charges being tried, a general threat is not admissible to show consciousness of guilt." *Id.* The state presented no evidence as to what the boyfriend's testimony was going to be had he testified, which he did not, or that he had any knowledge of the incident. We reject the other contentions made by the state.

Just as in *Dupont* and *Gelabert*, this evidence was not harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). It tended to impermissibly discredit Mariano based upon evidence of bad character or a propensity toward violence, both of which are inadmissible matters. *See Gelabert*, 407 So. 2d at 1010-11. The defendant's case rested on the proposition that he was trying to kill only himself, not his girlfriend. This inadmissible evidence of a propensity for violence towards others cannot be considered harmless.

Excited Utterances

Over objection, the state introduced Schaab's statements to the deputies **[**9]** at the scene, as well as statements she made to Mariano's sister during an early morning phone call, as excited utterances, an exception to the hearsay rule. Section 90.803(2), Florida Statutes, provides:

> HN3 **(2) Excited utterance.**--A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This provision was interpreted in *Stoll v. State*, 762 So. 2d 870, 873 (Fla. 2000), to require three elements:

> HN4 [I]n order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event.

As stated by Professor Ehrhardt, HN5 excited utterances partake of sufficient guarantees of truthfulness because "a person who is excited as a result of a startling event does not have the reflective capacity which is essential **[**10]** for conscious misrepresentation." Charles W. Ehrhardt, *Florida Evidence* § 803.2 (2003 ed.). Whether the necessary state of mind exists in the declarant to qualify the statement as an excited utterance is a preliminary fact for the court to determine pursuant to § 90.105, Florida Statutes, and the court's rulings are reviewed for an abuse of discretion. *Cotton* **[*116]** *v. State*, 763 So. 2d 437, 440-41 (Fla. 4th DCA 2000).

Generally, the most litigated element of the excited utterance factors is the time element. In *State v. Jano*, 524 So. 2d 660 (Fla. 1988), the supreme court noted, HN6 "'As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of Section 90.803(2). This excited state may exist a substantial length of time after the event.'" *Id.* at 661 (quoting 1 C. Ehrhardt, *Florida Evidence* § 803.2 at 473-74 (2d ed. 1984)). "'Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some **[**11]** proof that the declarant did not in fact engage in a reflective thought process.'" *Id.* at 662 (quoting E. Cleary, *McCormick on Evidence* § 297 at 856 (3d ed. 1984)).

The supreme court discussed the time element again in *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004). In *Hutchinson*, in which the defendant was charged with first degree murder, a witness testified that on the night of the murder she spoke to one of the victims who told her that she had fought with the defendant that night. The trial court admitted this testimony as an excited utterance.

On appeal from the conviction and death sentence, the supreme court found that the time between the startling event, the fight, and the time of the phone conversation between the witness and the victim was not clear. The court stated that the only finding it could make was that the fight was probably between 7:00 and 7:30 p.m. and that without more information, the court could only speculate as to whether the victim engaged in reflective thought. *Id.* at 951. The court held that because the state failed to present evidence that the victim did not engage in reflective thought **[**12]** in the time period between the fight and the phone call, the victim's statement could not be admitted as an excited utterance, even though the time between the startling event and the statement may have been relatively short. *Id.* at 951-52. Thus, *Hutchinson* reinforces the proposition that HN7 it is the state's burden to prove that the declarant did not engage in reflective thought.

Moreover, the court also stated that the fact that the victim was still crying when the statement was made was not itself sufficient to demonstrate that she had not engaged in reflective thought.

It cited with approval our statement in *Charlot v. State*, 679 So. 2d 844, 845 (Fla. 4th DCA 1996), that "[a] statement as to what occurred does not become admissible merely because the victim is still in an excited state." *Hutchinson*, 882 So. 2d at **952**.

In *Charlot*, a police officer testified that when he arrived at a victim's house after a 9-1-1 call, she was frantic and hysterical. He was uncertain how long it took him to get the information from the victim but testified that he was in the apartment for about two hours. 679 So. 2d at 845. **[**13]** We explained, as noted above, that HN3 "the victim's excited state does not alone make the statement admissible. "'[I]f the supposed statement, exclamation, or spontaneous utterance takes the form of a narrative of a past event, it is very well established that it may not be considered as part of the transaction or res gestae.'" *Id.* (quoting *Green v. State*, 93 Fla. 1076, 113 So. 121, 123 (Fla. 1927)).

In this case, Schaab called Chapman anywhere from thirty to ninety minutes after the event. By this time Schaab had been questioned by three deputies at the scene and related the events several times. Schaab was crying and hysterical **[*117]** when she informed Chapman about the events of the evening. Chapman testified that Schaab said that Mariano had tried to kill her and would run her over if she got out of the car.

Applying the rule of *Jano*, the interval between the event and the statement to Chapman was long enough to permit reflective thought. Thus, the statement is inadmissible unless there is evidence that reflective thought did not occur. The mere fact that Schaab was still upset and crying is not sufficient to show that reflective thought has not occurred. **[**14]** *See Hutchinson; Charlot.* Further, the statement took the form of a narrative of the events, which in and of itself indicates that the victim is reflecting upon the events of the evening. Because the only evidence the state provided to support the admission of the statement was the victim's upset state, this was insufficient to warrant admission of the statement as an excited utterance.

The admission was not harmless, because Chapman testified that Schaab told her of specific threats that Mariano made to her, including that Mariano tried to stab her in the car and that he would run her down if she got out of the car. These specific threats were not harmless beyond a reasonable doubt. They went beyond the statements relayed by the officers and were inconsistent with Schaab's trial testimony. Thus, they should not be admitted in a new trial.

Three deputies also testified to statements Schaab made to them at the scene. Mariano objected to Schaab's statements to Deputy Brochu as hearsay, but the trial court admitted the testimony under the excited utterance exception. However, similar testimony given by Deputies Rice and Porcelli was not objected to at trial.

Deputy Brochu testified **[**15]** that he spoke to Schaab about ten minutes after he and Rice stopped the vehicle. She was very concerned, upset, and was shaking. Over objection, Brochu testified to the narrative that Schaab gave to him.

> She stated that she was at her residence in Jensen Beach, Martin County, Florida when the male, the driver, Mr. Frank Mariano came over to her house. He had been drinking. They had a discussion about their children. They had children together and had lived together in the past. That . . .

Mariano objected again, contending that this was a "dialogue." The court again overruled the objection, and Brochu continued:

> That they got into an argument. That she was going to drive back to his residence in Port St. Lucie. As they were driving, they got into an argument. He took over driving the car and started looking for an isolated spot along Baker Road. He made statements that he wanted her to go with him. That if he could not have her, no one would. Along those lines.

This statement was merely a narrative of past events. In the recent case of *J.A.S. v. State*, 920 So. 2d 759 (Fla. 2d DCA 2006), the deputy interviewed a father about an altercation **[**16]** with his son shortly after its occurrence. The second district, relying on *Charlot*, noted:

> HN9 A narrative of a past event is generally not considered a spontaneous statement, *Charlot v. State*, 679 So. 2d 844, 845 (Fla. 4th DCA 1996) (citing *Green v. State*, 93 Fla. 1076, 113 So. 121, 123 (1927)), nor is a statement in reply to questions from law enforcement, *Blandenburg*, 890 So. 2d at 272. Here, the father answered the deputy's questions about how he had been injured. This was not a case in which the victim blurted out **[*118]** the details of a traumatic event without prompting. *See, e.g.*, *Rivera v. State*, 718 So. 2d 856 (Fla. 4th DCA 1998) (holding that excited utterance was proven when evidence showed that a patrol officer saw the victim screaming and waiving her hands; when he approached, she was crying, her dress was ripped, and she asked the officer to keep the defendant away from her).

Id. at 763. Similarly, there is no evidence that Schaab blurted out statements. Instead, she was merely responding to the deputy's attempt to get information regarding what had occurred. She was explaining events **[**17]** earlier in the evening leading up to the incident in the car, not just a description of what occurred in the car.

Again, it is the state's burden to show that the statement is an excited utterance. The state does not do this merely by showing that the statement was made close to the startling event and the declarant was upset. The deputy testified that the statements made by Schaab were prompted by his questioning. On this record, the court abused its discretion in admitting Brochu's testimony regarding Schaab's statement. *See J.A.S.; Charlot.*

We need not address the testimony of the other two deputies, as Mariano did not object to their testimony based upon the excited utterance exception. Even though Mariano's objection to Deputy Brochu's statement was overruled, it did not mean that his objection to the other statements would be futile. The application of the excited utterance exception is specific to each statement. Had he objected to the statements of the other deputies, the court may have found that these later statements were made too late and with time for Schaab to reflect. It could have also found that these clearly were narrative statements. We therefore do not address **[**18]** them as the issue was not preserved.

Because of the erroneous admission of improper collateral evidence as impeachment and the admission of hearsay evidence which did not qualify as excited utterances, we reverse Mariano's conviction and sentence and remand for a new trial.

KLEIN, J. and BAILEY, JENNIFER D., Associate Judge, concur.

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